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Lip Service to the Laws of War: Humanitarian Law and United Nations Armed Forces

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LIP SERVICE TO THE LAWS OF WAR: HUMANITARIAN LAW AND UNITED NATIONS ARMED FORCES

*Richard D. Glick**

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INTRODUCTION

Despite recent setbacks, United Nations peacekeeping and peace enforcement will continue to present great long term potential for dealing with conflict situations. As a consequence, ongoing and future deployments of U.N. armed forces will continue to raise the subject of U.N. compliance with the laws of war. Officers of the United Nations

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concede that U.N. military forces are subject to some form of customary international humanitarian law (IHL). In practice, however, the United Nations treats the subject as a political issue and not as a fundamental legal obligation. Resistance to the application of IHL to U.N. armed forces is driven by the belief that it will hinder the U.N. mission to promote peace and security and undermine the Organization's role, such as it is, as a regulator of the international order situated above the horizontal plane on which other subjects of international law act. The question of U.N. compliance with IHL is a serious one. Allegations of IHL violations by U.N. military forces include murder, torture, rape, and pillage.¹

The United Nations has asserted a number of legal arguments that undercut its obligations as a subject of IHL. By implication, these arguments represent a repudiation of the IHL premise that each human person must be treated with at least a minimum amount of care and that this duty of minimum treatment be made superior to utilitarian goals, even where those utilitarian goals address the maintenance of international peace and security. It is essential that the United Nations tangibly establish its commitment to IHL in order to deter future violations by its forces. Even from the utilitarian perspective of U.N. effectiveness, the vigorous implementation of IHL by U.N. forces will promote, not compromise, the accomplishment of U.N. political and military goals.

In Part I, I will discuss the normative framework in which U.N. humanitarian obligations are established. In Part II, I will explain why the application of IHL to U.N. armed forces will not compromise the effectiveness of U.N. missions by deconstructing a number of specific arguments put forward by the Organization that challenge the applicabil-

1. Members of a Canadian troop contingent forming part of the U.N. force in Somalia are alleged to have tortured and killed a Somalia teenager in 1993. See Clyde H. Farnsworth, *Canadian Shock Troops: Elite Corps Disbanded After Abuses Disclosed*, N.Y. TIMES, Jan. 29, 1995, § 4, at 2.

Members of a Canadian, New Zealand, French, Ukrainian, and African country contingent allegedly engaged in sex with women being held against their will by Serbian irregulars in the former Yugoslavia. Witnesses alleged that young Muslim or Croat women were forced into U.N. armored personnel vehicles or civilian cars. See *U.N. Troops Frequented Sex Slave Den, Report Claims*, TORONTO STAR, Nov. 1, 1993, at A2; Francis Harris, *Peacekeepers Accused of Using Bosnian Sex Slaves*, DAILY TELEGRAPH, Nov. 2, 1993, at 14.

Members of a Bulgarian military contingent forming part of the United Nations Transitional Authority in Cambodia (UNTAC) allegedly engaged in rape, pillage, and assault on civilians, all of which went unpunished. *Sisterhood Is Global*, MS., Jan./Feb. 1993, at 10; Dr. Roy S. Lee, Remarks at the Eleventh Annual Seminar on International Humanitarian Law for Diplomats Accredited to the United Nations (Jan. 20, 1994) (notes on file with the author) [hereinafter Remarks of Dr. Roy S. Lee (I)]. Médecins Sans Frontières (MSF), a French humanitarian assistance organization, accused U.N. forces of beating and stealing from Somali civilians. See Mark Huband, *UN Troops in Somalia Accused of Lying to Hide Rights Abuses*, GUARDIAN, July 30, 1993, at 1.

ity or conflict with the basic premises of the existing IHL regime. This article concludes that the United Nations is bound by the rules of customary international humanitarian law, and occupies a horizontal relationship with the other subjects of IHL that it engages in armed conflict. When U.N. armed forces engage in armed conflict, the Organization qualifies as a "party to armed conflict" within the meaning of IHL, and U.N. troops also fall within the IHL definition of "combatants," rendering the Organization subject to IHL obligations. Continuing U.N. arguments to the contrary either deprive IHL definitions of their determinacy or regress to a claim of undeserved special status for Charter norms and for the Organization. Moreover, with respect to U.N. intervention in civil wars, the existing allocation of law-making authority between sovereign states, on one hand, and the international order, on the other, leaves individual states and the United Nations without the authority to assert the civil war IHL regime. As a consequence, U.N. forces intervening in civil conflict are bound by the full IHL regime and must recognize in all hostile combatants the "combatant's privilege" and prisoner of war status. Finally, U.N. obligations under IHL cannot be satisfied by troop contributing states. By virtue of U.N. command and control, the United Nations alone is responsible under IHL for the conduct of its forces, because only an authority that exerts command and control over troops can require that those troops comply with IHL obligations, a position supported by the draft code of state responsibility and the International Court of Justice. The contrary notion — that troop contributing states could be directly responsible for actions taken under U.N. command and control — would cripple the effectiveness of any U.N. force by creating an incentive for contributing states to interfere with and compromise U.N. operations. Ultimately, humanitarian law obligations may require that the international community modify the way in which peacekeeping and peacemaking operations are structured.

I. THE APPLICABILITY OF CUSTOMARY INTERNATIONAL HUMANITARIAN LAW (IHL) TO U.N. ARMED FORCES: NORMATIVE FRAMEWORK

Representatives of the United Nations acknowledge that United Nations armed forces² are legally bound by at least some form of cus-

2. A "United Nations armed force," whether constituted under Chapter VI or VII of the Charter, is a subsidiary organ of the United Nations comprised of contingents furnished by member states but integrated into a chain of command under the orders of the U.N. Secretary-General. This structure is evidenced by UNOSOM II (Somalia), ONUC (Congo), and UNEF I (Sinai). For UNOSOM, see S.C. Res. 814, U.N. SCOR, 48th Sess., 3188th mtg. at 5, U.N.

tomary international humanitarian law,³ the international law rules which

Doc. S/RES/814 (1993); *Further Report of the Secretary-General Submitted in Pursuance of Paragraphs 18 and 19 of Resolution 794* (1992), U.N. SCOR, 48th Sess., ¶¶ 78–88, U.N. Doc. S/25354 (1993); for ONUC, see S.C. Res. S/4387, U.N. SCOR, 12th Sess., Supp. for July–Sept. 1960, at 16, U.N. Doc. S/4387 (1960); *Regulations Governing United Nations Force in the Congo (ONUC)*, U.N. SCOR, 15th Sess., ¶¶ 5–6, U.N. Doc. ST/SGB/ONUC/I (1963), reprinted in 3 ROSALYN HIGGINS, *UNITED NATIONS PEACEKEEPING 1946–1967: DOCUMENTS AND COMMENTARY* 71 (1980); and for UNEF I (Sinai), see *Letter from the U.N. Secretary-General to Troop Contributing States*, U.N. GAOR, 13th Sess., Annex 1, Agenda Item 65(c), U.N. Doc. A/3943 (1958); see also *Model Agreement Between the United Nations and Member States Contributing Personnel and Equipment to United Nations Peace-Keeping Operations: Report of the Secretary General*, U.N. GAOR, 46th Sess., ¶ 4, U.N. Doc. A/46/185 (1991) [hereinafter *Model Agreement*]. During their period of assignment to the force, individual members of each national contingent are considered U.N. personnel and subject to U.N. rules prohibiting the seeking or accepting of instructions from their governments. See Oscar Schachter, *Legal Aspects of the United Nations Action in the Congo*, 55 AM. J. INT'L L. 1, 11 (1961).

In contrast to the foregoing arrangement, operations may be conducted by non-U.N. forces acting under the command of one or more states, pursuant to an authorization of the Organization, as for example, under U.S. command in the cases of UNITAF (Somalia), Iraq, and Korea. For UNITAF, see S.C. Res. 794, U.N. SCOR, 47th Sess., 3145th mtg. ¶¶ 3–4, U.N. Doc. S/RES/794 (1992); *Letter Dated 29 November 1992 from the Secretary-General Addressed to the President of the Security Council*, U.N. SCOR, 47th Sess., U.N. Doc. S/24868 (1992); for Iraq, see S.C. Res. 662, U.N. SCOR, 45th Sess., 2934th mtg., U.N. Doc. S/RES/662 (1990); S.C. Res. 665, U.N. SCOR, 45th Sess., 2938th mtg., U.N. Doc. S/RES/665 (1990); S.C. Res. 678, U.N. SCOR, 45th Sess., 2963d mtg., U.N. Doc. S/RES/678 (1990); and for Korea, see S.C. Res. 83, U.N. SCOR, 5th Sess., 474th mtg., U.N. Doc. S/1511 (1950); S.C. Res. 84, U.N. SCOR, 5th Sess., 476th mtg., U.N. Doc. S/1588 (1950); see also SEYERSTED, *UNITED NATIONS FORCES IN THE LAW OF PEACE AND WAR* 32–33 (1966); Richard R. Baxter, *The Role of Law in Modern War*, 47 PROC. AM. SOC'Y INT'L L. 90, 97 (1953).

The contingents comprising a U.N. armed force retain their national character and individual national commanders and remain "subject to the military rules and regulations of their respective national States without derogating from their responsibilities as members of the Force as defined in these [the relevant U.N.] Regulations[.]" *Regulations Governing United Nations Force in the Congo (ONUC)*, *supra*, ¶ 29(c); see *Model Agreement*, *supra*, ¶¶ 9, 12, 25. Professor Seyersted characterizes the remnants of national control as matters internal to the force and not affecting its overall command and control or international personality. See SEYERSTED, *supra*, at 96–97. National contingent commanders may not seek to confirm orders or take directions from their states of origin, *Improving the Capacity of the United Nations for Peace-Keeping: Report of the Secretary General*, U.N. GAOR, 48th Sess., at 7–8, U.N. Doc. A/48/403 (1994), but often have "liaison officers" in their command who are authorized by the United Nations to maintain communications with their governments for informational purposes only. A contingent commander or representative of a troop contributing state that objects to orders transmitted through the U.N. chain of command may not countermand such orders but must raise the issue with an appropriate member of the U.N. command, while representatives of his national government may raise the issue with the Secretary-General or the Security Council. *Id.* This does not always happen. See *infra* notes 179–81 and accompanying text.

3. See, e.g., Umesh Palwankar, *Applicability of International Humanitarian Law to United Nations Peace-Keeping Forces*, 294 INT'L REV. RED CROSS 227, 232 (1993) (stating that U.N. forces are bound by IHL) (quoting a letter dated Oct. 23, 1978 from the U.N. Secretary-General to the President of the ICRC); Dr. Roy S. Lee, Remarks at the Conference on the Law of International Organizations in Situations of Civil War (Jan. 30, 1994) (notes on file with the author) (stating that U.N. forces are bound by IHL) [hereinafter Remarks of Dr. Roy S. Lee (II)].

govern permissible methods and means of warfare and the treatment of sick and wounded combatants and civilians.⁴ There is U.N. practice that

The preponderance of legal opinion is in accord with the view that United Nations forces are subject to at least some elements of IHL. See, e.g., *Conditions of Application of Humanitarian Rules of Armed Conflict to Hostilities in Which United Nations Forces May Be Engaged*, 1971 ANNUAIRE DE L'INSTITUT DE DROIT INTERNATIONALE 465, 465-70 (Resolution I, adopted by the Institute at its 1971 Session); Dietrich Schindler, *United Nations Forces and International Humanitarian Law*, in STUDIES AND ESSAYS ON INTERNATIONAL HUMANITARIAN LAW AND RED CROSS PRINCIPLES IN HONOUR OF JEAN PICTET 521, 526 (Cristophe Swinarski ed., 1984); Oscar Schachter, *Authorized Uses of Force by the United Nations and Regional Organizations*, in LAW AND FORCE IN THE NEW INTERNATIONAL ORDER 65, 75 (Lori F. Damrosch & David J. Scheffer eds., 1991); SEYERSTED, *supra* note 2, at 204-05; Hersch Lauterpacht, *The Limits of the Operation of the Law of War*, 30 BRIT. Y.B. INT'L L. 206 (1953).

The first conflicts involving force authorized by the United Nations raised the issue of whether or not the United Nations was legally bound by IHL, and at that time the answer was less certain. See, e.g., Committee on Study of Legal Prob. of the U.N., *Should the Laws of War Apply to United Nations Enforcement Action?*, 46 PROC. AM. SOC'Y INT'L L. 216, 220 (1952). An ASIL Committee concluded that,

[T]he purposes for which the laws of war [speaking also of the *jus in bello*] were instituted are not entirely the same as the purposes of regulating the use of force by the United Nations. . . . [T]he United Nations should not feel bound by all the laws of war, but should select such of the laws of war as may seem to fit its purposes[.]

Id., at 220.

4. For its part, the United Nations concedes to be bound only by the "principles and spirit" of IHL. See *infra* notes 85-99 and accompanying text.

The United Nations is not a party to any of the humanitarian law conventions and is therefore not bound, as a treaty party, by their terms. However, to a large extent, the norms expressed in humanitarian conventions are reflective of customary international law. See generally *United States v. von Leeb*, 11 TRIALS OF WAR CRIMINALS BEFORE THE NUERNBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW NO. 10 495 (1950) ("The High Command Case") [hereinafter *High Command Case*]; THEODOR MERON, *HUMAN RIGHTS AND HUMANITARIAN NORMS AS CUSTOMARY LAW* 45-78 (1989). This article will focus on those customary law obligations involving the methods and means of warfare, as reflected in the Convention Respecting the Laws and Customs of War on Land, Oct. 18, 1907, *reprinted* in 2 AM. J. INT'L L. 90 (Supp. 1908), and in DOCUMENTS ON THE LAWS OF WAR 44 (Adam Roberts & Richard Guelff, eds., 1982) [hereinafter *Hague Convention (IV)*], and on the customary law obligations protecting those fallen *hors de combat* and civilians, as set forth in the Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31 [hereinafter *Geneva Convention (I)*]; the Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85 [hereinafter *Geneva Convention (II)*]; the Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter *Geneva Convention (III)*]; and the Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 [hereinafter *Geneva Convention (IV)*] [The Geneva Conventions (I), (II), (III), and (IV) will hereinafter collectively be referred to as the Geneva Conventions of 1949].

In *Reparation for Injuries Suffered in the Service of the United Nations*, 1949 I.C.J. 174, 179 (Apr. 11), the International Court of Justice concluded that the Organization was "a subject of international law and capable of possessing international rights and duties" (emphasis added), notwithstanding the fact that such rights and duties had evolved principally as the practice of states. See RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 223 (1986) [hereinafter *RESTATEMENT (THIRD)*].

is consistent with this view,⁵ although the existence of such practice should not be given undue weight in any analysis concerning the extent

5. There is practice that can be interpreted as consistent with legal obligation on the part of the Organization. See SEYERSTED, *supra* note 2, at 182-96. For example, in the Congo, both the ONUC forces and the Katangese rebels claimed IHL rights and alleged IHL violations by the other. See *id.* at 193. In the Congo, the International Committee of the Red Cross was allowed to make visits to prisoners held by the United Nations and to brief United Nations personnel on the requirements of the Geneva conventions; the ICRC issued reports in which the United Nations was listed as the "Detaining Power." *Id.* at 196. The United Nations also paid a "*somme forfaitaire*" to the ICRC as compensation in connection with the death of ICRC personnel in circumstances that pointed to the involvement of U.N. forces. See *id.* at 195. In addition, the United Nations entered into an agreement settling claims by Belgian nationals against the United Nations for damage to persons and property arising out of U.N. operations in the Congo. This agreement specifically reflects IHL in that it excludes claims arising from military necessity. See Agreement Relating to the Settlement of Claims Filed Against the United Nations in the Congo by Belgium Nationals, Feb. 20, 1965, U.N.-Belg., 535 U.N.T.S. 199; see also *Respect for Human Rights in Armed Conflict: Report of the Secretary-General*, U.N. GAOR, 24th Sess., Agenda Item 61, at 7-8, U.N. Doc. A/7720 (1969) [hereinafter *Respect for Human Rights in Armed Conflict (I)*].

There are statements by the Organization that may also be considered "practice" of the Organization. See, e.g., Palwankar, *supra* note 3; Remarks of Dr. Roy S. Lee (II), *supra* note 3. However, while there are a number of instances in which the United Nations has indicated that its forces "should" observe IHL or in which the U.N. has required that troop contributing states agree to do so, such instances do not on their face clearly evidence an expression of *opinio juris* on the part of the Organization; in none of these instances did there appear a reference to the customary obligations of U.N. forces. See, e.g., Palwankar, *supra* note 3, at 232 (citing memoranda from the Secretariat to all commanders of U.N. forces, dated May 24, 1978, and from the Commander-in-Chief to all commanders at General Staff and contingent levels, dated Oct. 30, 1978) ("[T]he principles and spirit of the rules of IHL *should* apply, as laid down in the Geneva Conventions of 1949, the Additional Protocols of 1977 and elsewhere.") (emphasis added); *Regulations Governing United Nations Force in the Congo*, *supra* note 2, ¶ 43 ("The Force shall observe the principles and spirit of the general international Conventions applicable to the conduct of military personnel."); Agreement Concerning the Service with the United Nations Peace-Keeping Force in Cyprus of the National Contingent Provided by the Government of Austria, Feb. 21-24, 1966, U.N.-Aus., ¶¶ 10-11, 557 U.N.T.S. 130, 136 (1966)

(I should also like to refer to article 40 of the Regulations concerning "Observation of Conventions" which provides: 'The force shall observe the principles and spirit of the general international Conventions applicable to the conduct of military personnel.' . . . The international Conventions referred to in this Regulation include, inter alia, the Geneva (Red Cross) conventions of 12 August 1949[.] . . . In this connexion, and particularly with respect to the humanitarian provisions of these Conventions, it is requested that the Governments of the participating States ensure that the members of their contingents serving with the Force be fully acquainted with the obligations arising under these Conventions and that appropriate steps be taken to ensure their enforcement);

Model Agreement, *supra* note 2, ¶ 28 ("[The United Nations peace-keeping operation] shall observe and respect the principles and spirit of the general international conventions applicable to the conduct of military personnel.") (emphasis added).

However, more recently, the Organization has not been entering into agreements with troop contributing states requiring that state contingents follow IHL rules. See Remarks of Dr. Roy S. Lee (I), *supra* note 1. While a representative of the United Nations stated that the practice of requiring the application of IHL rules by troop contingents has resumed, *id.*, U.N. armed forces were dispatched to Yugoslavia and Cambodia unaccompanied by any statement or letter to the troop contributing states from the Secretary-General setting forth the IHL obligations of the troops, see Palwankar, *supra* note 3, at 233.

of U.N. IHL obligations because of the inherent unreliability of studies purporting to detail humanitarian practice in armed conflict.⁶ With specific exceptions, IHL rules vest all entities that are parties to armed conflict with the same obligations and thereby place them on the same legal plane.⁷ The implications for the United Nations of this "horizontal" relationship between subjects of humanitarian law have engendered continued resistance to the application of IHL to U.N. forces by those who consider the United Nations to occupy, by logical necessity, a superior as opposed to an equal position in *all* legal relationships related to the Organization's mission to maintain or restore international peace and security.⁸ According to this view, a horizontal relationship between the United Nations and another party to armed conflict is antithetical to a world order organized pursuant to the principles expressed in the U.N. Charter and supervised by the United Nations. Resistance to the applicability of IHL to U.N. forces has taken the form of claims to a unique status for the United Nations with respect to IHL and novel constructions of IHL, both of which conflict with the very humanitarian rules by which the Organization claims elsewhere to be bound.⁹

With respect to those powers given to the Security Council in the Charter, the United Nations, acting through the Security Council, necessarily exercises regulatory powers over member states. This vertical relationship based on the supremacy of Security Council actions can be analogized to relationships found in the European Community and in national, federal systems. Where no vertical relationship or supremacy exists, two entities, whether the United Nations and a state, the EU and one of its member states, or the U.S. federal government and a constituent state, must interact with each other from a horizontal position, namely, a position of equality.¹⁰ Humanitarian law rules

6. See Richard R. Baxter, *Multilateral Treaties as Evidence of Customary International Law*, 41 BRIT. Y.B. INT'L L. 275 (1965-66). Meron notes that customary IHL, unlike treaty law, may not be denounced (except by the act of violation), and is not subject to reservation. Theodor Meron, *The Geneva Conventions as Customary Law*, 81 AM. J. INT'L L. 348, 349 (1987).

7. IHL does recognize a vertical relationship between government and rebel forces involved in civil war, pursuant to which rebel forces may be regulated by the state. See *infra* notes 72, 107-17 and accompanying text.

8. See U.N. CHARTER art. 1 ("The Purposes of the United Nations are: 1. To maintain international peace and security, and to that end: to take effective collective measures for the prevention and removal of threats to the peace, and for the suppression of acts of aggression or other breaches of the peace[.]").

9. See discussion *infra* part II.

10. See Siegfried Wiessner, *Federalism: An Architecture for Freedom*, 1 NEW EUR. L. REV. 129, 132-33 (1993) (defining the vertical relationship of federal structure in terms of a "composite of several state organizations and legal orders" and a "central state" that relate

articulate minimum standards of conduct that can not be subordinated to non-humanitarian Charter based norms.¹¹ As a consequence, the Organization must function in a manner that is consistent with both sets of norms.

As an indication of their relative status among the hierarchy of legal norms, those norms set forth in the U.N. Charter which dictate the basic rules of the international order are considered peremptory norms of international law.¹² Membership in the United Nations, along with the concomitant acceptance by members of Charter principles and the Organization's Charter based functions,¹³ has become symbolic of membership in the international community.¹⁴ This is profound evidence of the hierarchical position accorded the Charter as a source of law.

through "an allocation of powers, channels of mutual influencing of policies, and a certain homogeneity of the orders of the component units and the central unit of political organization."); Eric Stein, *Treaty-Based Federalism*, A.D. 1979: A Gloss on Covey T. Oliver at the Hague Academy, 127 U. PA. L. REV. 897 (1979) (discussing the functioning of the European Community and the supremacy of Community law in those areas where the EC treaty implies supremacy. The relationship between the EC and the individual states of which it is comprised is analogized to the vertical relationship that is characterized by "federal" states.)

11. See generally Ronald St. J. MacDonald, *Fundamental Norms in Contemporary International Law*, 25 CAN. Y.B. INT'L L. 115 (1987); Theodor Meron, *On a Hierarchy of International Human Rights*, 80 AM. J. INT'L L. 1 (1986); Prosper Weil, *Towards Relative Normativity in International Law*, 77 AM. J. INT'L L. 413, 423-30 (1983).

12. Rules of international law from which there may be no derogation are described as "peremptory" norms or "*jus cogens*." See OPPENHEIM'S INTERNATIONAL LAW § 2, at 7-8 (Robert Jennings & Arthur Watts eds., 9th ed. 1992). They have been described as "[s]itting atop the hierarchy of international law[.]" *Princz v. Federal Republic of Germany*, 26 F.3d 1166, 1180 (D.C. Cir. 1994), cert. denied, 115 S. Ct. 923 (1995) (Wald, J., dissenting), reprinted in 33 I.L.M. 1483, 1497 (1994). While there exists no definitive list of peremptory norms, those peremptory norms reflected in the Charter likely include the prohibition on the unlawful use of force, see U.N. CHARTER art. 2(4), respect for the sovereign equality of states, see U.N. CHARTER art. 2(1), and the principle of self determination, see U.N. CHARTER art. 1(2); see also *Report of the International Law Commission on the Second Part of Its Seventeenth Session and on Its Eighteenth Session*, U.N. GAOR, 21st Sess., U.N. Doc. A/6309/Rev.1 (1966), reprinted in [1966] 2 Y.B. INT'L L. COMM'N 169, 248, U.N. Doc. A/CN.4/SER.A/1966/Add.1, U.N. Sales No. 67.V.2. Professor Henkin stated the inverse proposition, that norms considered peremptory are often those that serve as quasi-constitutional rules of the international order. See Louis Henkin, *General Course of Public International Law*, 216 R.C.A.D.I. 52 (1989).

13. Cf. U.N. CHARTER art. 4(1) ("Membership in the United Nations is open to all other peace loving states which accept the obligations contained in the present Charter and, in the judgment of the Organization, are able and willing to carry out these obligations.") (emphasis added).

14. See generally THOMAS M. FRANCK, *THE POWER OF LEGITIMACY AMONG NATIONS* 195-207 (1990) (discussing the concept of "community" as defining rules and the coercive power to conform to a rule created by the community, Franck argues that conformity is a criterion by which a community regulates who will enjoy the community's benefits). According to Professor Franck's taxonomy of international rules, those rules that define the international community are among those that have the strongest pull to compliance and arguably have the highest status among norms.

But the dignity of the human person has also evolved into a basic organizing principle of the international order, of equal or similar stature to peremptory Charter norms.¹⁵ Respect for the principle of humanity, as manifested in IHL, has also become a condition of membership in the international community,¹⁶ and many humanitarian law norms are deemed to constitute peremptory norms of international law.¹⁷ These norms have come to be regarded as having a status comparable to, if not higher than, Charter based norms.¹⁸ Humanitarian norms have been

15. Both human rights and humanitarian law arise out of the respect for the human dignity of the individual and reflect the need to protect the same, despite the historical differences in origins of these two branches of law. See generally Jacques Meurant, *Humanitarian Law and Human Rights Law: Alike Yet Distinct*, 293 INT'L REV. RED CROSS 89 (1993); Louise Doswald-Beck & Sylvain Vite, *International Humanitarian Law and Human Rights Law*, 293 INT'L REV. RED CROSS 94 (1993); Oscar Schachter, *Human Dignity as a Normative Concept*, 77 AM. J. INT'L L. 848 (1983).

16. See generally FRANCK, *supra* note 14, at 200-07. As many states are parties to the Geneva Conventions of 1949 as are members of the United Nations. As of December 31, 1993, 185 states are party to the Geneva Conventions, see *States Party to the Geneva Conventions of 12 August 1949 and to Their Additional Protocols*, 298 INT'L REV. RED CROSS 68, 70 (1993), and 185 states are members of the United Nations, see *Multilateral Treaties Deposited with the Secretary-General: Status as at 31 December, 1994*, at 3, U.N. Doc. ST/LEG/SER.E/13, U.N. Sales No. E.95.V.8 (1995). See also G.A. Res. 2444, U.N. GAOR, 23d Sess., Supp. No. 18, at 50, U.N. Doc. A/7218 (1969) (humanitarian principles should be observed by "all governmental and other authorities responsible for action in armed conflicts" (emphasis added), which the Secretary-General interpreted as addressing "every other authority which has the responsibility of conducting military operations in the course of armed conflicts[.]" *Respect for Human Rights in Armed Conflict (I)*, *supra* note 5, at 6 (emphasis added)); Andy Bowers, *Europe Urges Russia to Negotiate With Chechnya* (NPR Morning Edition radio broadcast, Jan. 4, 1995) (demonstrating how the community of states makes clear that the behavior of a state may place it outside of the bounds of the community: "Yesterday, Germany, Sweden, and the Netherlands, all voiced concern about what's going on in Chechnya. The Swedish foreign minister said, 'A civilized country does not resolve conflicts in a manner that causes so much human suffering, death and destruction.' . . . [T]he German foreign minister, Klaus Kinkel, voiced similar concerns[.]"), available in LEXIS, News Library, Curnws File.

17. See Hague Convention (IV), *supra* note 4, pmbl. ¶ 8, 2 AM. J. INT'L L. at 91-92, DOCUMENTS ON THE LAWS OF WAR at 45 (Martens clause). For a discussion of the Martens Clause as an element of customary international law, see *infra* note 92. The rules set forth in common Article 3 of the Geneva Conventions of 1949 were described by the International Court of Justice as a "minimum yardstick" reflective of "elementary considerations of humanity." *Military and Paramilitary Activities in and Against Nicaragua* (Nicar. v. U.S.), 1986 I.C.J. 14, ¶ 218 (June 27) (quoting *Corfu Channel Merits* (U.K. v. Alb.), 1949 I.C.J. 22 (Apr. 9)), reprinted in 25 I.L.M. 1023 (1986). With regard to the Geneva Conventions of 1949, Theodor Meron has noted their "humanitarian underpinnings and deep roots in tradition and community values." See Meron, *supra* note 6, at 350. Moreover, the International Law Commission concluded that limitations on the methods and means of warfare were also peremptory norms. See *Report of the International Law Commission on the Work of Its Thirty-Second Session*, U.N. GAOR, 35th Sess., Supp. No. 10, at 97-98, U.N. Doc. A/35/10 (1980).

18. See, e.g., MacDonald, *supra* note 11, at 144 ("[I]t is difficult to see why it [the Charter] should prevail over rules *jus cogens* and *erga omnes*; they bind all states and are non-derogable whereas the Charter is essentially concerned with the acts of Members.")

characterized as "essential and inalienable human rights,"¹⁹ and focus on protection of the individual as opposed to the group.²⁰ They may not be diminished by reference to an external standard or subordinated to the essentially utilitarian mission of an international organization,²¹ and no competing value can take precedence over them, whether or not that competing value is grounded in the Charter.²² Therefore, while an International Conference on Human Rights concluded that "peace is the underlying condition for the full observance of human rights and war is their negation,"²³ wholly unrestricted U.N. action as a means of achieving a state of peace can not be justified as effectively maximizing human rights if inconsistent with the principles of humanity, where, as a central organizing principle, the international community has established in the IHL rules a fundamental minimum standard for the treatment of human beings. Even if one were to go so far as to treat the U.N. Charter in an expansive manner as the "constitution" of the international order, the status to which this would elevate Charter norms would not *per se* diminish the relative status of IHL norms.²⁴

Ultimately, with respect to the terms of the Charter, there is no conflict between IHL and the Charter norms related to international peace and security. To the extent that the rules of the international community expressed in the U.N. Charter vest the organs of the United Nations with specific powers to supervise the international order, the United Nations, as a necessary correlative, occupies a superior legal position with respect to those powers and a vertical relationship to the subjects of its supervision.²⁵ The Security Council, acting to maintain or restore international peace and security, is expressly given the power to make recommendations, to take decisions binding on states, and even to

19. S.C. Res. 237, U.N. SCOR, 22d Sess., 1361st mtg., U.N. Doc. S/RES/237 (1967).

20. See *supra* note 15.

21. Professor Schachter notes that such rights "derive from the inherent dignity of the human person[.]" as opposed to being derived from "the state or any other external authority." Schachter, *supra* note 15, at 853.

22. See Oscar Schachter, *The United Nations and Internal Conflict*, in DISPUTE SETTLEMENT THROUGH THE UNITED NATIONS 301, 305 (K. Venkata Raman ed., 1977) (listing competing goals derivable from the Charter).

23. FINAL ACT OF THE INTERNATIONAL CONFERENCE ON HUMAN RIGHTS, at 18, U.N. Doc. A/CONF.32/41, U.N. Sales No. E/68.XIV.2 (1968) (Resolution XXIII: Human Rights in Armed Conflicts).

24. Various Charter norms and norms derived from the principle of humanity are related. For example, the right of democratic entitlement and the corollary concept of popular sovereignty hold that the legitimacy of a government is derived from the consent of its populace. See *infra* note 111. Thus, the legitimacy of state decision-making through international bodies such as the United Nations devolves to the consent of individuals.

25. See *supra* note 7.

authorize the use of force against a state.²⁶ In the context of armed conflict, these powers serve to recognize or bestow the right or absence of right to use force corresponding to the *jus ad bellum*.²⁷ In contrast, while the United Nations may deploy its own armed forces pursuant to the provisions of Chapter VI or VII, that action on the part of the Organization does not itself imply a vertical relationship between U.N. forces and opposing forces. Thus, while the existence of the United Nations does provide a mechanism for assessing "right" and "wrong" with respect to the original entitlement to the resort to force that is necessarily vertical in its operation, one would have to engage in a further step of logical analysis to conclude that the mere existence of the United Nations creates an exception to the principles of humanity upon which IHL and the division between the *jus ad bellum* and the *jus in bello* are based.²⁸

26. See U.N. CHARTER, arts. 36, 39 (Security Council has power to make recommendations), art. 25 (members agree to accept and carry out Security Council decisions), arts. 42, 48 (Security Council may take action by force, may authorize action by members); see generally Michel Virally, *Unilateral Acts of International Organizations*, in INTERNATIONAL LAW: ACHIEVEMENTS AND PROSPECTS 241 (Mohammed Bedjaoui ed., 1991).

27. At the birth of the United Nations there existed a clear division in international law between the *jus ad bellum* or "law of war," governing the right of a state to resort to the force of arms to settle conflict, and the *jus in bello* or "law in war," governing permissible prosecution of the conflict and the treatment of civilians and fallen combatants. See generally Bernhardt Graefrath, *Introduction to the Law of Conflictual Relations*, in INTERNATIONAL LAW: ACHIEVEMENTS AND PROSPECTS, *supra* note 26, at 709. The *jus in bello* licenses the attacks of one military force on the other so long as the means of inflicting mayhem and destruction conform to certain rules and so long as those licensed to commit acts of war, i.e., "combatants," reasonably attempt to shield civilians, the wounded, and the sick from attack. Prior to the full evolution of this divide, the legal rights of those now protected by IHL depended, *inter alia*, on the entitlement or "just cause" to engage in conflict of the sovereign power to which they were subject. See, e.g., THEODOR MERON, HENRY'S WARS AND SHAKESPEARE'S LAWS 34 (1993) (discussing Henry V's need to establish a justification for his invasion of France in order to avoid responsibility for causing death) [hereinafter HENRY'S WARS].

28. The divide between the two bodies of law recognized four mutually supporting premises that have an existence independent of the Charter: (i) the transcendent dignity of the individual human person requiring a minimum quantum of protection, see *supra* notes 15-17 and accompanying text, (ii) the inherent difficulty of determining objective right from wrong in war, see, e.g., James F. Childress, *Francis Lieber's Interpretation of the Laws of War: General Orders No. 100 in the Context of His Life and Thought*, 21 AM. J. JURIS. 34, 45-47 (1976) (noting that the American Civil War Confederate General Jackson, for one, believed that no Union prisoners of war should be taken because "the war was an offence against humanity so monstrous that it outlawed those who shared its guilt beyond the pale of forbearance."), (iii) the fact that those persons who bear the brunt of the suffering in armed conflict — field combatants and civilians, as opposed to political leaders — have little control over the commencement, conduct or termination of conflict, see Childress, *supra*, at 48; cf. Zumwalt Seeks More Research on Effects of Agent Orange (NPR Morning Edition radio broadcast, Sept. 17, 1994) (remarks of Admiral Elmo Zumwalt, Vietnam War veteran) ("Military men, I think, recognize that they're carrying out in war decisions made by civilian masters and find it easy to understand the professional actions of military men on the other side."), available in LEXIS, News Library, Curnws File; and (iv) the degree to which the realpolitik of warfare renders ineffective rules of warfare that are prescribed unilaterally by one party for another. See *infra* notes 59-68 and accompanying text.

To reach such a conclusion, one must assume the subordination of IHL norms to those expressed in the Charter.

Since the entity known as a "state" is a construct of law, armed conflict between states is a conflict between legal regimes with incompatible sources of authority, substantive rules, and social orders.²⁹ The same is true where the United Nations (with or as a surrogate for the international community) engages in armed conflict with a state or rebel force. IHL represents the one set of universal principles which remain to organize the conduct of conflictive parties. In that sense, the IHL paradigm conceptualizes the rules of IHL as resting above the conflictive parties and neutrally regulating their conflict as it occurs on a horizontal legal plane. The United Nations can simultaneously exist (i) in a horizontal legal relationship with conflictive states with respect to IHL or *jus in bello* rules governing the operational conduct of a U.N. armed force, and (ii) in a vertical relationship with conflictive states with respect to *jus ad bellum* rules regulating the resort to force.³⁰

The International Court of Justice addressed the issue of the U.N.'s legal status, as manifested by the Organization's rights and responsibilities in the Reparations case,³¹ involving the assassination of Count Bernadotte while serving as an agent of the United Nations in Palestine. Although Count Bernadotte's mission arose out of the Organization's authority to regulate matters of international peace and security³² — part and parcel of its vertical relationship to other international actors — the United Nations' right to claim reparations for the Count's death was deemed to be governed by the same rules that horizontally bind all other members of the international community. The Court stated that the Organization had "the capacity to resort to the customary methods recognized by international law for the establishment, the presentation and the settlement of claims."³³ No special status existed in this regard for the United Nations.³⁴ Thus, *per force*, the United Nations may enjoy simultaneously a different legal status with respect to the exercise of each of its various functions. The Reparations court's analysis linked the status and rights of subjects

29. See *infra* notes 59–68 and accompanying text.

30. In a report on respect for human rights in armed conflict, the U.N. Secretary-General discussed at length the degree to which humanitarian norms are consistent with the purposes and principle of the United Nations. See *Respect for Human Rights in Armed Conflict (I)*, *supra* note 5, at 10–15.

31. *Reparation for Injuries Suffered in the Service of the United Nations*, 1949 I.C.J. 174 (Apr. 11).

32. Count Bernadotte was appointed U.N. mediator to Palestine pursuant to a resolution of the General Assembly. See PHILIP C. JESSUP, *THE BIRTH OF NATIONS* 283 (1974).

33. 1949 I.C.J. at 177.

34. It should be noted that the case involved expansion of U.N. rights, not their limitation.

of international law to the "needs of the community" and the "requirements of international life."³⁵ To the extent that these needs and requirements are reflected in the broad reach of IHL to encompass all *de facto* conflicts,³⁶ such needs and requirements argue against special status for the United Nations with regard to IHL.³⁷

Consistent with IHL, that special status of the United Nations pertaining specifically to the maintenance of international peace and security may be preserved, and attacks on U.N. forces prohibited (and criminalized as a matter of individual responsibility) as violations of the *jus ad bellum*, despite the fact that the United Nations may not outlaw the actions of combatants taken against U.N. forces that are otherwise protected by the combatant's privilege.³⁸ Because all conflicts in which the United Nations engages are international in character and subject to the rules providing for the combatant's privilege,³⁹ only this approach is consistent with the view that the Organization is bound by IHL.⁴⁰ Outlawing attacks on U.N.

35. The Court stated:

[W]e must consider what characteristics it was intended thereby to give to the Organization. The subjects of law in any legal system are not necessarily identical in their nature or in the extent of their rights, and *their nature depends upon the needs of the community*. Throughout its history, the development of international law has been influenced by the *requirements of international life*, and the progressive increase in the collective activities of States has already given rise to instances of action upon the international plane by certain entities which are not States.

1949 I.C.J. at 178 (emphasis added). Similarly, Professor Weil, speaking of the criteria by which the international system establishes a normative hierarchy, observed that "it is recognition of a rule's importance by the international community of states that is the touchstone as between peremptory and ordinary rules[.]" Weil, *supra* note 11, at 425.

36. See *infra* notes 73-76 and accompanying text.

37. See G.A. Res. 2675, U.N. GAOR, 25th Sess., Supp. No. 28, at 76, U.N. Doc. A/8028 (1971) (The General Assembly noted that the international community has in the present century "accepted an increased role and new responsibilities for the alleviation of human suffering in any form and in particular during armed conflicts[.]"); see also *supra* notes 14-24.

38. See *infra* notes 100-57 and accompanying text.

39. See *infra* notes 100-57 and accompanying text.

40. The Institut de Droit International concluded that the *jus in bello* could not provide for "discrimination" in favor of the United Nations, but that such discrimination might exist with regard to the *jus ad bellum*. See *Equality of Application of the Rules of the Law of War to Parties to an Armed Conflict*, 1963 ANNUAIRE DE L'INSTITUT DU DROIT INTERNATIONALE 369, 376 (Resolution IV, adopted by the Institute at its 1963 session); *Conditions of Application of Humanitarian Rules of Armed Conflict to Hostilities in which United Nations Forces May Be Engaged*, *supra* note 3, pmbl. ¶¶ 4-5, at 465. Thus, any legislative power that the Security Council might possess relating to the use of force pursuant to Chapters VI or VII would be limited to the *jus ad bellum*. See *supra* note 27. This is true with regard to armed conflict involving U.N. forces acting under Chapter VI or VII mandates. For example, the aide-mémoire outlining the directives given to the United Nations Force in Cyprus (UNFICYP) states principles of "self-defense" that include: "(a) attempts by force to compel them to withdraw from a position which they occupy under orders from their commanders, . . . [and] (c) attempts by force to prevent them from carrying out their responsibilities as ordered by their commanders[.]" *Note by the Secretary-General: Aide-Mémoire Concerning Some Questions Relating to the*

forces as contrary to the *jus ad bellum* is consistent with the Security Council's approach in several situations⁴¹ and the Allies' approach to attacks by Germany's Nazi regime.⁴² Such an approach limits individual responsibility for attacks on U.N. forces to military commanders and political leaders,⁴³ except to the extent that rank and file soldiers could otherwise be prosecuted for war crimes.⁴⁴

Derogations from IHL are not permitted,⁴⁵ and any excuses for non-performance of IHL obligations on the part of the Organization must be consistent with the Organization's horizontal status under the IHL regime and must rely on rules applicable to all conflictive parties. By contrast, U.N. arguments for limiting its obligations under IHL devolve into arguments for special rules and exceptions unavailable to other subjects of IHL. For example, U.N. arguments of necessity can not constitute an excuse for non-performance, because IHL specifically limits claims of non-military necessity and takes "military" necessity into account.⁴⁶ Therefore, claims by the United Nations based on arguments of necessity outside the scope of IHL would *per se* involve granting the United Nations an elevated status and special rights.⁴⁷ Excuses for non-performance must

Function and Operation of the United Nations Peace-Keeping Force in Cyprus, U.N. SCOR, 19th Sess., at 4, U.N. Doc. S/5653 (1964).

41. This type of approach is compatible with the language in S.C. Res. 804, U.N. SCOR, 47th Sess., 3168th mtg., U.N. Doc. S/Res/804 (1993) (Angola), and in S.C. Res. 792, U.N. SCOR, 47th Sess., 3143d mtg., U.N. Doc. S/Res/792 (1992) (Cambodia), which merely condemned attacks on U.N. personnel without clearly conflicting with the combatant's privilege. In contrast, S.C. Res. 837, U.N. SCOR, 47th Sess., 3229th mtg., U.N. Doc. S/Res/837 (1993) (Somalia), implied that the attacks on U.N. forces were illegal as a matter of the *jus in bello*.

42. See Lauterpacht, *supra* note 3, at 236.

43. *Id.*

44. See generally M. Cherif Bassiouni, *Nuremberg Forty Years After*, 80 PROC. AM. SOC'Y INT'L L. 59 (1986); see also *infra* note 92. Sadly, regardless of the substantive legal approach taken, any effort to criminalize attacks on U.N. armed forces will remain subject to the limitations of victor's justice and the possibility that legal liability will be bargained away in the terms of any peace settlement not based on unconditional surrender. See Marc D. Charney, *The Laws of War Are Many, but Self-Interest Is the Only Enforcer: Conversations/Telford Taylor*, N.Y. TIMES, Dec. 25, 1994, § 4, at 7 (Former Nuremberg prosecutor contrasts Nazi unconditional surrender with situation in the former Yugoslavia with reference to the total control exercised by the victors in the former case). Mr. Taylor describes as the norm, specific cases in which prosecutions for war crimes occurred but where no meaningful punishment was ever inflicted on the wrongdoer.

45. See *supra* note 18 and accompanying text.

46. See *Report of the International Law Commission on the Work of Its Thirty-Second Session*, *supra* note 17, at 97-98. "Violations" of IHL are permitted to the extent that they constitute permissible reprisals. *Id.*

47. Some sort of "inability" to perform IHL obligations as an excuse for non-performance has been noted by the Secretary-General. See *Respect for Human Rights in Armed Conflict: Report of the Secretary General*, U.N. GAOR, 25th Sess., Agenda Item 47, ¶ 191(b)(v), at 60, U.N. Doc. A/8052 (1970) [hereinafter *Respect for Human Rights in Armed Conflict (II)*]. However, it is difficult to conceive of an entity that is capable of engaging in international

be available to any subject of IHL to avoid the *de facto* creation of a special status for the U.N. Future changes to U.N. status with respect to IHL are possible to the extent that non-peremptory humanitarian norms are subject to change by the processes of international lawmaking.⁴⁸ Ultimately, claims of special status for the United Nations as a matter of IHL carve out a greater sphere of action in which the Organization may commit acts which the international community has decided are below a minimum level of humane conduct. Such claims would leave to the vagaries of U.N. politics the vindication of humanitarian concerns. To the extent that IHL norms are considered fundamental, the U.N.'s approach undermines the legitimacy of the Organization as an instrument for the development of more humane international order based on law.

II. ARGUMENTS BY WHICH THE UNITED NATIONS PURPORTS TO AVOID THE BURDENS OF IHL

There have been allegations of serious violations of IHL by U.N. armed forces,⁴⁹ and it is likely that other violations have occurred.

armed conflict yet incapable of observing basic humanitarian norms, and such a basis for excusing performance can easily swallow the body of humanitarian rules. "Inability" can not serve as a Trojan horse for lack of political will. The United Nations argues that it is incapable of occupying territory, despite the fact that U.N. armed forces are in fact capable of placing territory under their actual control, as occupation is traditionally defined in the Hague Regulations, and are capable of effective control over territory to which the United Nations has no sovereign title, as occupation is more commonly defined today. See EYAL BENVENISTI, *THE INTERNATIONAL LAW OF OCCUPATION* 3-4 (1993).

Because the concept of "inability" to perform establishes a *de facto* excuse for derogating from IHL norms, the grounds for such a derogation must be construed narrowly. Cf. *Symposium: Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights*, 7 HUM. RTS. Q. 1 (1985) (identifying legitimate objectives and principles of interpretation of Civil and Political Covenant derogation clauses).

48. See generally ANTHONY A. D'AMATO, *THE CONCEPT OF CUSTOM IN INTERNATIONAL LAW* (1971); Michael Akehurst, *Custom as a Source of International Law*, 47 BRIT. Y.B. INT'L L. 8 (1974-75); KAROL WOLFKE, *CUSTOM IN PRESENT INTERNATIONAL LAW* (1964); see also *infra* notes 132-39 and accompanying text.

49. See *supra* note 1 (allegations of murder, torture, rape and pillage). Customary IHL, evidenced in the Martens Clause of the Hague Convention (IV), articles 46 and 47 of the annexed regulations, and common article 3 of the Geneva Conventions of 1949, prohibits rape, pillage, and harm to civilians not collateral to action that is militarily necessary. See MERON, *supra* note 4, at 45-47; Theodor Meron, *Rape as a Crime Under International Humanitarian Law*, 87 AM. J. INT'L L. 424, 425 (1993).

In addition, there have been reports of U.N. forces firing on civilians. The organization African Rights alleges that on May 27, 1993, Belgian soldiers shot an unarmed man in the back. AFRICAN RIGHTS, *SOMALIA: HUMAN RIGHTS ABUSES BY THE UNITED NATIONS FORCES* 19-20 (1993). African Rights alleges further that a United Nations humanitarian officer stated that the Organization was not responsible for IHL violations and that the matter must be taken up with the commander of the Belgian national contingent, who in turn is said to have refused to meet with the victim's family. *Id.* Another report states that a United States helicopter gunship opened fire on a Somali crowd killing at least two Somalis, after a sniper shot and killed a Pakistani

Notwithstanding the fact that the United Nations concedes generally that it is bound by IHL, it avoids responsibility in specific cases by way of legal arguments, many of them recycled, which devolve into claims of special status and special rules for the Organization. In discussions of the Organization's *customary* legal obligations, U.N. arguments are often framed in terms of objections to joining the various humanitarian *conventions*, despite the dubious relevancy of these objections to matters concerning customary law. By focusing on the humanitarian conventions, the Organization can make arguments that turn on a textual analysis that is not necessarily applicable to its obligations under customary law. As a general matter, the arguments made with reference to the humanitarian conventions illustrate the organization's hostility toward IHL as a legal limitation on its own powers. For example, beyond the question of whether or not the United Nations has the capacity to occupy territory,⁵⁰ the United Nations asserts that it does not have the power to establish an integrated penal system with investigatory, arrest, and detention capability,⁵¹ notwithstanding the fact that the former-Yugoslav war crimes tribunal

soldier. See 2 *Somalis Shot Dead by U.S. Copter Crew*, N.Y. TIMES, June 29, 1993, at A3. The killing of civilians not collateral to action that is militarily necessary is prohibited by customary IHL. See Hague Convention (IV), *supra* note 4, pmbl. ¶ 8, Annex, art. 46, 2 AM. J. INT'L L. at 91, 113, DOCUMENTS ON THE LAWS OF WAR at 45, 56; Geneva Conventions of 1949, *supra* note 4, 6 U.S.T. at 3116-18, 3320-22, 3318-20, 75 U.N.T.S. at 32-34, 86-88, 136-38 (common art. 3); MERON, *supra* note 4, at 36.

Colonel Ann Wright of the U.N.'s Justice Division in Somalia criticized U.N. forces for failure to provide the legally required warning to civilians prior to commencing a military attack in which civilians might be harmed. See Keith B. Richburg, *U.N. Report Criticizes Military Tactics of Somalia Peace Keepers*, WASH. POST, Aug. 5, 1993, at A22. Regarding the duty to warn, see Maj. John Embry Parkerson, Jr., *United States Compliance with Humanitarian Law Respecting Civilians During Operation Just Cause*, 133 MIL. L. REV. 31, 47-50 (1991).

MSF also alleged that on June 17, 1993, U.N. forces conducted a military operation in Mogadishu with rockets, artillery and machine gun fire that included an attack on the facilities of the humanitarian organization Action Internationale Contre la Faim and Digfer Hospital, killing one and wounding eight. MÉDECINS SANS FRONTIÈRES, COMMUNICATION ON THE VIOLATIONS OF HUMANITARIAN LAW IN SOMALIA DURING UNOSOM OPERATIONS, Annex 2 (1993) (addressed to the U.N. Security Council, U.N. chief military commander in Somalia and commanders of the national contingents); Donatella Lorch, *U.N. Attack in Mogadishu Follows Hours of Bombing by U.S.*, N.Y. TIMES, June 18, 1993, at A1. MSF acknowledged that Somali irregulars were using a portion of the hospital for military purposes, as a position from which to attack U.N. troops with small arms but alleged, *inter alia*, that U.N. forces failed to minimize collateral damage to civilians, and used disproportionate force in the attack on the hospital. Attacks on hospitals *not* being used for military purposes are strictly prohibited as a matter of customary law, as codified in the Hague Convention (IV), *supra* note 4, Annex, arts. 25, 27, 2 AM. J. INT'L L. at 107-08, DOCUMENTS ON THE LAWS OF WAR at 53; and in the Geneva Convention (I), *supra* note 4, ch. III, 6 U.S.T. at 3128-30, 75 U.N.T.S. at 44-46. Even if the position of the snipers rendered the hospital a legitimate target, the prohibition against the use of disproportionate or excessive force embodied in the Martens Clause would still apply. See MERON, *supra* note 4, at 36.

50. See *supra* note 47.

51. Remarks of Dr. Roy S. Lee (I), *supra* note 1.

is vested with just such powers.⁵² U.N. officers assert that there is no entity that can serve as protecting power for the United Nations,⁵³ despite the fact that the Secretary-General himself has suggested that the ICRC could capably function in that role.⁵⁴ Moreover, this objection is legally irrelevant as a matter of customary law and factually irrelevant as a matter of conventional law given that the protecting power mechanism has been used only four times in its history.⁵⁵ Indeed, many of these arguments are based on constricted interpretations of language inconsistent with the broad interpretation properly given to norms based on the fundamental concept of human dignity.⁵⁶ To be consistent with the peremptory nature of many humanitarian norms, failure to observe IHL cannot be based on budgetary constraints,⁵⁷ failure to provide adequate training to troops⁵⁸ or other failings of political will that IHL is intended specifically to address.

Five specific arguments advanced by the United Nations that limit its IHL obligations will be discussed below. They are arguments that: (A) the application of IHL to the United Nations will compromise the effectiveness of the Organization in its efforts to promote peace; (B) the Organization cannot be a "party to an armed conflict" and U.N. personnel can not be "combatants"; (C) the United Nations is bound only to observe the "principles and spirit" of IHL, although the Organization refuses to clarify

52. See S.C. Res. 827, U.N. SCOR, 47th Sess., 3217th mtg., U.N. Doc. S/Res/827 (1993); *Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808 (1993): Addendum*, U.N. SCOR, 47th Sess., U.N. Doc. S/25704/Add.1 (1993).

53. Remarks of Dr. Roy S. Lee (I), *supra* note 1.

54. See *Respect for Human Rights in Armed Conflict (I)*, *supra* note 5, ¶¶ 221–25, at 68–69; *Respect for Human Rights in Armed Conflict (II)*, *supra* note 47, ¶ 243, at 76.

55. M. Jean-Paul Fallet, Remarks at the Eleventh Annual Seminar on International Humanitarian Law for Diplomats Accredited to the United Nations (Jan. 20, 1994) (notes on file with the author).

56. Derogations from humanitarian norms are not permitted, see *supra* note 18, and like human rights norms, humanitarian norms should be construed broadly. Cf. *Symposium: Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights*, *supra* note 47.

57. Dr. Lee asked rhetorically how a United Nations with already tight resources would be able to provide for the food, clothing, hygiene, and other needs of POW's in its care. Remarks of Dr. Roy S. Lee (I), *supra* note 1.

58. The United Nations argues that the various troop contingents that comprise its forces all have different training and can not therefore be held to a common set of IHL rules. *Id.* At the level of international obligation, virtually all potential troop contributing states are subject to identical rules by virtue of their customary obligations and virtually all states are party to the Geneva Conventions of 1949. See *States Party to the Geneva Conventions of 12 August 1949 and to Their Additional Protocols*, *supra* note 16, at 70 (185 states are party to the Geneva Conventions of 1949). While the issue is more problematic at the operational level, the Organization and the various contingents must conform their methods of operations to IHL, not the other way around. It may require that states train standby troops for U.N. missions in accordance with a common training manual. It may mean that states must finally enter into Article 43 agreements with the United Nations. It may even mean that the United Nations must cease recruiting peacekeeping forces in the form of troop contingents contributed by states.

the meaning of that term; (D) the United Nations may apply the IHL regime applicable to civil wars and thereby criminalize attacks on U.N. forces, thus freeing itself from the obligation to respect the combatant's privilege; and (E) the humanitarian obligations of troop contributing states satisfy the United Nation's own obligations.

*A. The Effectiveness of the United Nations,
and IHL as "Marginal Law"*

The concerns of those resisting application of IHL to the United Nations are functional as well as legal. They fear that the United Nations will come to be regarded as just another party to the armed conflict in question and that it will lose the perceived neutrality that enables the Organization to function as effectively as it does. The United Nations correctly views its neutrality as a key factor in its ability to broker solutions to conflicts or to deliver aid. This perceived neutrality is compromised or vitiated when the United Nations is seen as "taking sides" or becoming merely another party to an armed conflict.⁵⁹ Nonetheless, manipulating the *de jure* IHL status of the U.N. forces involved in an armed conflict in order to simulate or mandate neutrality — for example, by the outlawry of attacks on U.N. peacekeepers — is irrelevant to the actual perception of neutrality on the battlefield or around the negotiating table. Opposing parties base their treatment of U.N. personnel and operations on the effect of U.N. military involvement on the political and military situation, not the humanitarian law consequences of such involvement.⁶⁰

Laws that favor the United Nations over the party with which it is in conflict will not be obeyed by that party. Therefore, the presence or absence of such laws is irrelevant to the issue of U.N. effectiveness. The concept of "legality" itself is limited to the legal system by which it is defined. By definition, armed conflict represents the effort of one legal system to dominate and supplant another, whether or not such conflict

59. The possibility of casualties also makes it more difficult to obtain and sustain commitments of troops from states that might otherwise provide them.

60. Unfortunately, the very presence of U.N. forces will have some effect on the balance of power or the momentum of an armed conflict, and will therefore necessarily pose a threat to the aspirations of one of the conflictive parties; the question is to what degree are those aspirations threatened. One member of the U.N.'s peacekeeping staff stated that it is for this reason that U.N. forces will "obviously" be attacked if inserted into civil war situations. Elisabeth Lindenmayer, Remarks at the Eleventh Annual Seminar on International Humanitarian Law for Diplomats Accredited to the United Nations (Jan. 20, 1994) (notes on file with the author).

involves the United Nations.⁶¹ IHL has a unique status because it is comprised of the maximal set of rules conflictive parties will adhere to in any event, notwithstanding other law to the contrary. For this reason, IHL has been termed "marginal law,"⁶² because it is the only law that applies "when the great body of international law which regulates the peacetime relations of states has been cast aside by the belligerent."⁶³ In such legally primitive circumstances, any approach to IHL that attempts unilaterally to limit the opposing party's military tactics is doomed to failure.⁶⁴

For those involved in insurrection, the penalty of imprisonment or death is no worse than the risk of imprisonment or death resulting from

61. See Lauterpacht, *supra* note 3. From a historical perspective, yesterday's victor is today's status quo, and as Lauterpacht notes with regard to the United Nations, law, like history, is written by the victor. According to Lauterpacht,

[a]ll law and all legal doctrine presuppose the victory of right. Should, in any general conflagration, physical force wholly alien to the principles of the Charter of the United Nations and of international law as we know it emerge triumphant, a new legal order (if it may be so termed) dictated by the victor will arise. Juridical thinking can make no provision for that contingency. It is necessarily confined to the existing legal order and to the consequences flowing from it.

Id. at 236 (footnote omitted). In another sense, in terms of the criteria of legitimacy set out by Thomas Franck, warfare constitutes a state of affairs in which the most basic rules that define community are in dispute. See generally, FRANCK, *supra* note 14. The only rules that remain are those by which the "means of settlement," i.e., the armed conflict, will be conducted.

62. FRITS KALSHOVEN, *BELLIGERENT REPRISALS* xi (1971). In Kalshoven's words, IHL deals with "situations where the behaviour of the human species verges on the brink of what could still be considered human[.]" *Id.* Similarly, Baxter refers to the law of war in this respect as "last ditch" law. Baxter, *supra* note 2, at 93.

63. Baxter, *supra* note 2, at 93.

64. According to Bailey, the laws of war are constructed on the premise that "a belligerent should not be put at a disadvantage because the enemy breaks the rules[.]" Childress, *supra* note 28, at 66 (quoting SIDNEY BAILEY, *PROHIBITIONS AND RESTRAINTS IN WAR* 54 (1972)). Similarly, Lauterpacht asks:

What belligerent, unless he has already been defeated or unless, in desperate resignation, he expects defeat, will tolerate, without resorting to immediate retaliation, the conduct of an enemy who claims to dictate the rules of the context — selecting those which suit him and rejecting others? . . . It is not easy to visualize hostilities in which the rules governing their conduct are determined by one side[.]

Lauterpacht, *supra* note 3, at 242-43; see *Respect for Human Rights in Armed Conflict (I)*, *supra* note 5, ¶ 202, at 63.

That the above is true can be empirically confirmed in the failure of states in their attempts to outlaw insurrection. There are approximately 150 civil wars in the world today, Barbara Crossette, *What Is a Nation?*, N.Y. TIMES, Dec. 26, 1994, at A10, despite the fact that international law allows the state to prohibit and punish rebellion. See Geneva Conventions of 1949, *supra* note 4, 6 U.S.T. at 3116-18, 3220-22, 3318-20, 75 U.N.T.S. at 32-34, 86-88, 136-38 (common art. 3); *Respect for Human Rights in Armed Conflict (II)*, *supra* note 47, ¶¶ 152, 162-67, 182-86; Waldemar A. Solf, *Problems with the Application of Norms Governing Interstate Armed Conflict to Non-International Armed Conflict*, 13 GA. J. INT'L & COMP. L. 291, 291-93 (1983).

armed conflict itself.⁶⁵ Asking the rhetorical question why belligerents respect or violate IHL, H.P. Gasser of the ICRC took note of what he described as "cost-benefit analysis" — the fear of reprisals and considerations of international politics.⁶⁶ For the Bosnian Serbs, Mohammed Farah Aidid, or General Cedras, the analysis is a pragmatic one, involving a weighing of the costs and benefits of opposing U.N. action, by force or otherwise, calculated in light of their own respective political and military goals.⁶⁷ Such an analysis will consider the likelihood of U.N. military action, embargo, or other sanction in retaliation, the extent of U.N. military strength, the strength of U.N. political will, and the political will of the individual interested states. The fact that the United Nations may be deemed to express the international community's will is factored into this equation to the extent that it affects the balance of possible outcomes. It is for this reason that legal norms may be observed to a greater degree by conflictive parties when such norms protect U.N. personnel.

U.N. acceptance of and compliance with the full international IHL regime increases the likelihood of compliance with humanitarian norms by both sides at a cost of nothing more than acceptance of the *de facto* power relationships of the battlefield. On the other hand, U.N. failure to accept and comply with existing humanitarian rules lessens the likelihood that parties in conflict with the United Nations will themselves abide by such rules, without yielding an offsetting reduction in hostility to the basic U.N. mission. The author readily concedes that IHL, if respected, does affect military tactics, but the question of whether to respect such rules is of secondary concern in the context of *de facto* armed conflict with U.N. military forces where obeying such rules is perceived as significantly influencing the outcome of the conflict. Ultimately, outlawing attacks on U.N. military forces or otherwise providing for a special *de jure* status on

65. That is precisely the reason that states enhance the disincentives to insurrection through the use of torture or collective punishment, both prohibited by human rights and IHL.

66. Hans-Peter Gasser, *Scrutiny*, 9 AUSTL. Y.B. INT'L L. 345, 346 (1985); see also Charney, *supra* note 44. That his comment acknowledged the *de facto* role of reprisals is particularly enlightening given the fact that the right of reprisal, as a legal matter, has been severely limited. See George H. Aldrich, *Prospects for United States Ratification of Additional Protocol I to the 1949 Geneva Conventions*, 85 AM. J. INT'L L. 1, 15-17 (1991).

67. Cf. *Serbs Break Accord, Block Relief Trucks*, N.Y. TIMES, Oct. 3, 1994, at A4; Donatella Lorch, *In an Edgy Mogadishu, Relief Efforts Are in Jeopardy*, N.Y. TIMES, June 23, 1993, at A3 (reporting relief workers' concerns that the United Nations is unwittingly favoring some Somali clans over others and thus upsetting the political balance); Michael R. Gordon, *Clinton, Praising "Success," Says Goal Was Not to Capture Aidid*, N.Y. TIMES, June 18, 1993, at A14 (describing Somali attack on peacekeepers when it was perceived that they were going to take over radio station); Thomas L. Friedman, *Clinton Sending More Troops to Somalia*, N.Y. TIMES, Oct. 7, 1993, at A1, A10 (noting that Somali peace conferences held to reconcile various clans and factions were perceived by Aidid as threatening in that the process could create alternative power centers).

the part of U.N. forces as a matter of the *jus in bello* will be futile. Such approaches are doomed to failure and could only be enforced after the fact in the few cases where U.N. forces obtain some sort of unconditional surrender.⁶⁸

B. *Whether the United Nations Can Be a "Party to an Armed Conflict" and Whether Its Soldiers May Constitute "Combatants"*

The United Nations often argues that it need not take action otherwise required by IHL, because it is not and can not be a "party to an armed conflict,"⁶⁹ nor can its troops be considered "combatants."⁷⁰ These concepts are critical to the existing IHL paradigm because the concept of "party to an armed conflict" performs a "gatekeeping" function, establishing to whom IHL applies and under what circumstances. The activities of "parties to an armed conflict" are regulated by IHL; the activities of non-parties are not.⁷¹ Similarly, the distinction between "combatants" and "noncombatants" defines, among other things, who may kill legally and

68. In the words of Sir Hersch Lauterpacht, "[I]t is impossible to visualize the conduct of hostilities in which one side would be bound by rules of warfare without benefiting from them and the other side would benefit from rules of warfare without being bound by them." Lauterpacht, *supra* note 3, at 212; see also Charney, *supra* note 44.

69. See Remarks of Dr. Roy S. Lee (I), *supra* note 1.

70. See *id.*; Palwankar, *supra* note 3, at 232 (Author, as a member of the ICRC staff, cites U.N. representatives as saying that the U.N. does not believe that it can become a party to the Geneva Conventions of 1949 because, *inter alia*, "these [U.N.] forces might appear as 'combatants.'").

The concepts of "party to an armed conflict" and "combatant" are interrelated. In order to qualify as a "combatant" under customary IHL, one must be a member of a *de facto* armed force that is commanded by a person responsible for his subordinates, having a fixed, distinctive sign or emblem recognizable at a distance, carrying arms openly, and conducting its operations in accordance with the laws and customs of war. See Protocol I Additional to the Geneva Conventions of 1949, Dec. 12, 1977, art. 43(1), 1125 U.N.T.S. 3, 23, 16 I.L.M. 1391, 1410 (1977) [hereinafter Protocol I]; Geneva Convention (I), *supra* note 4, art. 13, 6 U.S.T. at 3124, 75 U.N.T.S. at 40; Geneva Convention (II), *supra* note 4, art. 13, 6 U.S.T. at 3228, 75 U.N.T.S. at 94; Geneva Convention (III), *supra* note 4, art. 4(3), 6 U.S.T. at 3320, 75 U.N.T.S. at 138; Hague Convention (IV), *supra* note 4, Annex, art. 1, 2 AM. J. INT'L L. at 97, DOCUMENTS ON THE LAWS OF WAR at 48; cf. *Respect for Human Rights in Armed Conflict (I)*, *supra* note 5, ¶ 176, at 57 (discussing minimal criteria for "armed conflict"). These requirements are based on the premise that humanitarian standards can only be promulgated and implemented through a chain of command; by contrast, armed mobs do not obtain the advantages of the laws of war and are subject to prosecution under municipal law. It is the United Nations that is responsible for the chain of command involving U.N. forces. See *supra* note 2; *infra* notes 159–61 and accompanying text.

The U.N. forces use the distinctive emblem of the United Nations, although it has been reported that United Nations armed forces have, in specific instances, removed their identifying markings to lessen the threat of attack. *Two U.N. Vehicles Are Hit in Somalia*, N.Y. TIMES, Nov. 24, 1993, at A14. By taking off their "fixed distinctive sign, recognizable at a distance," U.N. forces lose the combatant's privilege that they might otherwise have had.

71. See *supra* notes 69–70.

who may not be killed legally in the context of armed conflict. Under the existing paradigm, "combatants" may kill other combatants and be killed by them, yet must take care to spare "noncombatants" — principally civilians — to the greatest extent possible.⁷² IHL requires that each individual fall into one category or the other.⁷³ U.N. refusal to apply these concepts to its forces is tantamount to completely rejecting the applicability of IHL and makes no sense in the context of U.N. statements that it is bound by IHL.

The term "party to an armed conflict" is deemed to encompass any *de facto* authority exercising command and control over military forces. Those responsible for the formulation and interpretation of IHL apparently did not consider the concept of "party to" an armed conflict to be ambiguous where armed conflict was engaged in by states and by rebels.⁷⁴ The

72. If an individual qualifies as a combatant, he can not be tried as a criminal, and if captured, he is entitled to prisoner of war status. See M.H.F. Clarke et al., *Combatant and Prisoner of War Status*, in ARMED CONFLICT AND THE NEW LAW: ASPECTS OF THE 1977 GENEVA PROTOCOLS AND THE 1981 WEAPONS CONVENTION 107, 108 (Michael A. Meyer ed., 1989). If he does not qualify as a combatant, he can not be attacked but may be prosecuted under the criminal law for engaging in attacks. *Id.* While civil insurrection may be punished as a criminal offense, the IHL regime that applies to internal conflict does not apply to armed conflicts involving U.N. forces. See *infra* notes 100–57 and accompanying text.

The obligation to distinguish between combatants and civilians — only the former can be a legitimate target of violence — has been described as one of the "purposes" of IHL. Clarke et al., *supra*, at 112. This obligation was one of three principles highlighted by the General Assembly as applicable in all armed conflicts. See G.A. Res. 2444, *supra* note 16, at 50. The obligation to distinguish between combatants and civilians is a peremptory norm of international law. See *infra* note 92.

73. According to the British Manual of Military Law:

It is one of the purposes of the laws of war to ensure that an individual must definitely choose to belong to one class or the other, and shall not be permitted to enjoy the privileges of both; in particular, that an individual shall not be allowed to kill or wound members of the army of the opposed nation and subsequently, if captured or in danger of life, to pretend to be a peaceful citizen.

UNITED KINGDOM WAR OFFICE, MANUAL OF MILITARY LAW: AMENDMENT 12, ch. 14, ¶ 17 ([344 G 798 Supp.] 1936), *quoted in* Clarke et al., *supra* note 72, at 108. The principle of distinction is customary law. See MERON, *supra* note 4, at 34. While the means and circumstances by and in which a combatant must distinguish him or herself have been subject to modification as a matter of treaty in Protocol I, the essential requirement of distinction has remained. See Protocol I, *supra* note 70, arts. 44, 48, 1125 U.N.T.S. at 23, 25, 16 I.L.M. at 1410–11, 1412.

74. The General Assembly called for the application of basic humanitarian principles in "all armed conflicts," by "all governmental and other authorities responsible for action in armed conflicts[.]" not simply by states. G.A. Res. 2444, *supra* note 16, at 50 (emphasis added). The U.N. Secretary-General stated that the phrase "all armed conflicts" in Resolution 2444 was intended to avoid "certain traditional distinctions as between international wars, internal conflicts, or conflicts which although internal in nature are characterized by a degree of direct or indirect involvement of foreign Powers or foreign nationals." *Respect for Human Rights in Armed Conflict (I)*, *supra* note 5, ¶ 21, at 11.

To the extent that the issue of applicability of IHL to U.N. forces was considered, the conclusions drawn have evolved with time. See *supra* note 3.

term "armed conflict" encompasses all *de facto* conflicts,⁷⁵ with the purpose of extending protection to all those individuals who suffer as a consequence of armed conflict.⁷⁶ The existence of "armed conflict" is deemed a question of fact.

The United Nations is bound by customary IHL obligations that have arisen as the practice of states.⁷⁷ This is inconsistent with the view that

75. See *Respect for Human Rights in Armed Conflict (II)*, *supra* note 47, ¶ 131, at 43.

76. See INTERNATIONAL COMM. OF THE RED CROSS, COMMENTARY ON THE IV GENEVA CONVENTION OF 1949 20 (Jean S. Pictet ed., 1958) [hereinafter ICRC GENEVA (IV) COMMENTARY].

By its general character, this paragraph deprives belligerents, in advance, of the pretexts they might in theory put forward for evading their obligations. There is no need for a formal declaration of war, or for recognition of the existence of a state of war, as preliminaries to the application of the Convention. The occurrence of *de facto* hostilities is sufficient.

... The substitution of [the term "armed conflict"] for the word "war" was deliberate. It is possible to argue almost endlessly about the legal definition of "war".

... The expression "armed conflict" makes such arguments less easy. Any difference arising between two States and leading to the intervention of members of the armed forces is an armed conflict within the meaning of Article 2, even if one of the Parties denies the existence of a state of war.

Id.; see also Lauterpacht, *supra* note 3, at 221 n.3 (citing examples of judicial decisions in which hostilities in Korea were held not to constitute "war" and in which the existence of "war" was determinant as to the outcome of the cases). Schindler suggests that even a "minor frontier incident" is sufficient to constitute armed conflict. See Dietrich Schindler, *The Different Types of Armed Conflicts According to the Geneva Conventions and Protocols*, 163 R.C.A.D.I. 125, 131 (1979).

All conflicts to which U.N. forces are party are *per se* "international" in character, see *infra* notes 100–157 and accompanying text, although it should be noted that the concept of "armed conflict" performs an identical function with respect to international conflicts and civil wars, i.e., "armed conflicts not of an international character." See Geneva Conventions of 1949, *supra* note 4, 6 U.S.T. at 3116–18, 3220–22, 3318–20, 75 U.N.T.S. at 32–34, 86–88, 136–38 (common art. 3). In the context of civil wars, there is a minimum intensity necessary to qualify as an "armed conflict," but it is low, going down to but excluding "situations of internal disturbances and tensions, such as riots, [and] isolated and sporadic acts of violence[.]" Protocol II Additional to the Geneva Conventions of 1949, Dec. 12, 1977, art. 1(2), 16 I.L.M. 1442, 1443 (1977) [hereinafter Protocol II]. The Protocol II exclusion just quoted is reflective of customary international law, although Protocol II in its entirety sets a higher threshold. See Bart De Schutter & Christine Van De Wyngaert, *Coping With Non-International Armed Conflicts: The Borderline Between National and International Law*, 13 GA. J. INT'L & COMP. L. 279, 285 (1983); cf. Solf, *supra* note 64, at 294; Schindler, *supra*, at 146–48 (discussing ICRC practice). Schindler concludes that the threshold of violence constituting armed conflict not of an international character is breached when hostilities are of such an intensity that military forces, as opposed to police forces, are deployed against the insurgents in question. *Id.* at 147. In this vein, the Secretary-General noted that "[t]he duration of the conflict, the number and leadership of rebel groups, their installation or action in parts of the territory, the degree of insecurity, the existence of victims, the means adopted by the lawful government to establish lawful order, all have to be taken into account." *Respect for Human Rights in Armed Conflict (I)*, *supra* note 5, ¶ 176, at 57. He further noted that these criteria are not incorporated expressly into common article three of the Geneva Conventions of 1949, were considered significant by the participants at the 1949 Geneva Conference, but may not have been generally accepted *in toto* as determining the scope of article three. See *Respect for Human Rights in Armed Conflict (II)*, *supra* note 47, ¶¶ 133–34, at 43–44.

77. See *supra* notes 4, 11–48 and accompanying text.

the Organization cannot be a "party to" an armed conflict because it is not a state. Who but "parties to" armed conflict should be limited in their conduct? The assertion that the United Nations cannot be a party to armed conflict undermines the determinacy of the concept achieved by the broad definition of the term.⁷⁸ The United Nations' claimed inability to become a party to an armed conflict while at the same time conducting military operations equipped with tanks, mortars and helicopter gunships against organized military forces would seem, on the facts, so absurd and disingenuous as to not pass what Professor Franck has referred to as the equivalent of a "laughter test."⁷⁹ The U.N. position reintroduces the element of uncertainty and legal sophistry into the definition of "party to an armed conflict" when the Organization purports to define the term in a way unknown to anyone outside, and perhaps even inside, the Organization, with potentially far-reaching and dangerous implications.

Unfortunately, this is not a new argument by the United Nations. For example, when states contributing troops to ONUC expressed concern that they would become parties to an armed conflict in the Congo, the

78. See FRANCK, *supra* note 14, at 50-66 (discussing the importance of the attribute of "determinacy" in the analysis of whether or not states will likely comply with international law norms).

79. *Id.* at 55. According to Professor Thomas J. Farer, a consultant to the Secretary-General charged with investigating the June 5, 1993 attack on UNOSOM II troops by General Aidid, the United Nations does not consider itself to be involved in an armed conflict in Somalia. Thomas J. Farer, Remarks to the Center for International Studies (Nov. 24, 1993) (notes on file with the author). The United Nations proffers this conclusion despite the fact that U.N. forces have been involved in high intensity firefights against forces that are highly organized and display knowledge of sophisticated military tactics. U.N. forces have been armed at various times with AC-130 Gunships, Cobra helicopter gunships, M-48 tanks, armored personnel carriers, and mortars; and they have been subjected to fire from mortars, rocket-propelled grenades, and AK-47's. See, e.g., Michael R. Gordon & Thomas L. Friedman, *Details of U.S. Raid in Somalia: Success So Near, a Loss So Deep*, N.Y. TIMES, Oct. 25, 1993, at A1; U.N. Fire May Have Wounded 34 Somalis, N.Y. TIMES, Sept. 20, 1993, at A5. U.N. spokespersons refer to U.N. operations in military terms. See, e.g., *Report of the Secretary-General on the Work of the Organization*, U.N. GAOR, 48th Sess., Supp. No. 1, ¶ 438, at 84, U.N. Doc. A/48/1 (1994) (discussing the "military actions" carried out by UNOSOM II forces and the care taken to avoid "civilian casualties"); Anthony Goodman, *Five U.N. Peacekeepers in Somalia Killed, 44 Wounded*, REUTER LIBR. REP., June 17, 1993, available in LEXIS, News Library, Arcnews File (In the words of U.N. personnel, "planned targets seem to have been hit," and "UNOSOM has disrupted the militia's command and control capability and driven the militia from its base."); Farer, *supra* (describing a June 12, 1993 attack by U.N. forces as a reprisal for an earlier attack on U.N. forces.)

The United Nations claims that it is fighting "bandits" and "criminals," despite the fact that Thomas Farer's report submitted to the U.N. Secretariat noted specifically the military organization and discipline of the forces that carried out the June 5, 1993 attack on UNOSOM II troops, referring to their "firing discipline," "careful planning," and "sophisticated use of locations and camouflage." See *Report Pursuant to Paragraph 5 of Security Council Resolution 837 (1993) on the Investigation into the 5 June 1993 Attack on United Nations Forces in Somalia Conducted on Behalf of the Secretary-General*, U.N. SCOR, 48th Sess., Annex, at 4, U.N. Doc. S/26351 (1993).

Secretary General stated that the United Nations, inexplicably, could not become a party to an armed conflict so long as it was engaged in defensive operations.⁸⁰ Nonetheless, this history of counter-normative practice by the United Nations does not qualify as a lawmaking act, to the extent that elements of IHL are subject to the processes of positive lawmaking,⁸¹ because the notion that an attacking party alone is bound by IHL has been soundly rejected, is at odds with the concept of reciprocity at the regime's core,⁸² and is totally unworkable in the battlefield context where it is often not clear who is attacking whom and in response to what.⁸³ Moreover, the implications of such a view are staggering when one considers that the United Nations has defined its realm of action as constituting "self defense" in situations where there exist "attempts by force to prevent [U.N. forces] from carrying out their responsibilities as ordered by their commanders"⁸⁴ Thus, by definition, all U.N. peacekeeping mandates provide for "defensive" military operations not subject to the laws of war, except for the possibility that any given operation is *ultra vires* its mandate. Such a redefinition of the concept of "party to an armed conflict" would destroy humanitarian law if generally articulated by conflictive parties. Such obvious manifestations of organizational self-interest breed a cynicism that corrodes the overall integrity of the IHL rule system.

80. The Secretary General replied as follows:

If . . . United Nations troops engaged in defensive action, when attacked while holding positions occupied to prevent a civil war risk, this would not, in my opinion, mean that they became a party to a conflict; while the possibility of becoming such a party would be open, were troops to take the initiative in an armed attack on an organized army group in the Congo.

Report of Secretary-General on Steps to Implement S.C. Res. S/4741 of 21 Feb. 1961, U.N. SCOR, 16th Sess., Annex VII, U.N. Doc. S/4752 (1961) (message dated Feb. 24, 1961 from the Secretary General to certain African States, concerning the need for troops and the function of the Force), quoted in 3 HIGGINS, *supra* note 2, at 121-22.

81. See *infra* notes 132-37 and accompanying text.

82. See Gasser, *supra* note 66; cf. Christopher Greenwood, Remarks at the Eleventh Annual Seminar on International Humanitarian Law for Diplomats Accredited to the United Nations (Jan. 19, 1994) (notes on file with the author) (noting the ICRC's position that, as a matter of the Geneva Conventions of 1949, the obligations of any two parties to an armed conflict must be the same *vis à vis* each other).

83. See, e.g., David Crary, *Bosnian Army Accuses U.N. Force of Firing First in DMZ Gun Battle*, PHILA. INQUIRER, Oct. 26, 1994, at A4. The problem can devolve to an infinite regression to determine who attacked whom first and who was simply counterattacking in defense.

84. *Note by the Secretary-General: Aide-Mémoire Concerning Some Questions Relating to the Function and Operation of UNFICYP*, *supra* note 40. Thus, were the Bosnian Serb forces to attempt to retake heavy weapons previously turned over to U.N. forces, the United Nations' view of the law would allow it to engage in heavy combat over possession of the weapons yet not consider itself engaged in armed conflict. As a result of this view, neither the U.N. forces nor the Bosnian Serb forces fighting each other would be protected by IHL.

A United Nations entitled to conduct military operations outside the existing paradigm of protection is a United Nations unhindered by legal restraints and entitled to engage in actions that IHL prohibits. Fortunately, the United Nations remains bound by the same customary IHL rules that are binding on states, and Organization practice that is not in conformity with these rules constitutes violations of them.

C. The "Principles and Spirit" of IHL?

The United Nations argues that its IHL obligations are limited to those comprising the "principles" or the "principles and spirit" of IHL.⁸⁵ As with the concepts of "party to an armed conflict" and "combatant," the United Nations argues that it must comply with a set of IHL obligations unique to the Organization and unknown to anyone outside it. Professor Finn-Seyersted describes the genesis of the "principles and spirit" assertion as an attempt to distinguish between the more general principles of customary IHL, to which the Organization is bound, and some of the more detailed conventional provisions, which the Organization argued it would not be legally or factually capable of performing were it to become a party to the various humanitarian conventions.⁸⁶ While the concept of the "principles and spirit" of IHL may have corresponded originally to a more complete set of customary IHL norms, subsequently it appears to have contracted in scope so as to limit the United Nations' IHL obligations to only a small subset of customary obligations.⁸⁷

The body of United Nations customary IHL obligations should be extensive and should encompass the peremptory norms of IHL. The rules regulating the method and means of warfare are considered peremptory norms of customary law,⁸⁸ and commentators have concluded that most of the provisions of Geneva Conventions I, II, III, and many of the provisions of Geneva Convention IV and Protocols I and II also have

85. See, e.g., Palwankar, *supra* note 3, at 232 (quoting a letter dated Oct. 23, 1978 from the U.N. Secretary-General to the President of the ICRC, stating that "the principles of humanitarian law . . . must . . . be applied" by U.N. forces) (emphasis added).

86. SEYERSTED, *supra* note 2, at 190. But see *supra* notes 49–58 and accompanying text.

87. See Palwankar, *supra* note 3, at 233 (U.N. statements regarding its IHL obligations have been selective and have not made clear the applicability of, for example, those rules regulating the methods and means of warfare.)

88. See *Report of the International Law Commission on the Work of Its Thirty-Second Session*, *supra* note 17, at 97–98. With regard to their status as customary law, see e.g., High Command Case, *supra* note 4, at 535–42; Arthur K. Kuhn, *International Law and National Legislation in the Trial of War Criminals: The Yamashita Case*, 44 AM. J. INT'L L. 559 (1950). But see BENVENISTI, *supra* note 47, at 96–106 (with regard to the law of occupation, the Hague Convention (IV) had lost its normative force by the time the High Command and Tokyo trials reached these conclusions).

entered into the body of customary law.⁸⁹ The Organization is capable of carrying out many, if not all, customary obligations.⁹⁰

The Organization has not yet been willing to define the content of the term "principles and spirit."⁹¹ Even assuming, *arguendo*, that the United Nations is bound by a restricted set of obligations identifiable as the "principles and spirit" of IHL, there is no principled basis consistent with humanitarian imperatives on which the Organization can refuse to identify the specific content of these obligations.⁹² An unarticulated norm is no

89. See, e.g., MERON, *supra* note 4, at 41-74.

90. See *supra* notes 45-48 and accompanying text.

91. Cf. Palwankar, *supra* note 3, at 233; Remarks of Dr. Roy S. Lee (II), *supra* note 3.

92. While an exhaustive study of the term "principles and spirit" is beyond the scope of this paper, there are a number of norms so fundamental to IHL that they should readily be deemed binding on the United Nations. Those norms characterized as peremptory should readily be considered to fall within the concept of the "principles and spirit" of IHL. Included within this category are those rules regulating the methods and means of warfare. See *Report of the International Law Commission on the Work of Its Thirty-Second Session*, *supra* note 17, at 94-98. In addition, those rules embodying the concepts upon which the existing paradigm of IHL protection depends should be considered binding on the United Nations, for example, the concepts of "combatant" and "party to an armed conflict." See *supra* notes 69-84 and accompanying text. Also presumptively binding on the United Nations are those norms embodied in the Martens Clause, which contains the following three elements:

- (i) that the right of parties to choose the means and methods of warfare, i.e. the right of the parties to a conflict to adopt means of injuring the enemy, is not unlimited;
- (ii) that a distinction must be made between persons participating in military operations and those belonging to the civilian population to the effect that the latter be spared as much as possible; and (iii) that it is prohibited to launch attacks against the civilian population as such.

Walter Kälin, *Situation of Human Rights in Occupied Kuwait*, U.N. ESCOR Comm'n on Human Rights, 48th Sess., Prov. Agenda Item 12(b), at 11, U.N. Doc. E/CN.4/1992/26 (1992) [hereinafter HUMAN RIGHTS IN OCCUPIED KUWAIT]. The Martens clause has been characterized as embodying the most fundamental elements of humanitarian protection. See *Protection of Civilian Populations Against the Dangers of Indiscriminate Warfare*, 56 INT'L REV. RED CROSS 588 (1965). The Martens clause embodies the principle of distinction between civilians and persons participating in military operations that is so central to the existing paradigm of humanitarian protection. See *supra* note 72. The clause has been further described as peremptory in character, see HUMAN RIGHTS IN OCCUPIED KUWAIT, *supra*, and has been identified by the U.N. General Assembly as containing basic humanitarian principles to be applied by all governmental and other authorities responsible for action in armed conflict, see G.A. Res. 2444, *supra* note 16.

The term "principles and spirit" of IHL would presumably include those norms expressed in Common Article 3 of the Geneva Conventions of 1949, some of which overlap with the obligations incorporated in the Martens Clause. Common Article 3 of the Geneva Conventions of 1949 includes the following:

- (1) Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed *hors de combat* by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria.

To this end, the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons:

- (a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;

norm at all and can not provide a basis for analyzing conduct.⁹³ Such a

- (b) taking of hostages;
 - (c) outrages upon personal dignity, in particular humiliating and degrading treatment;
 - (d) the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples.
- (2) The wounded and sick shall be collected and cared for.

Geneva Conventions of 1949, *supra* note 4, 6 U.S.T. at 3116-18, 3220-22, 3318-20, 75 U.N.T.S. at 32-34, 86-88, 136-38 (common art. 3); *see also*, ICRC GENEVA (IV) COMMENTARY, *supra* note 76, at 38-40. These Article 3 norms have been characterized by the International Court of Justice as "elementary considerations of humanity." *Military and Paramilitary Activities in and Against Nicaragua* (Nicar. v. U.S.), 1986 I.C.J. 14, ¶ 218 (June 27), *reprinted* in 25 I.L.M. 1023 (1986); *see MERON, supra* note 4, at 32-37.

The term "principles and spirit" should also provide for individual responsibility in accordance with the violations of customary international law enumerated in the Nuremberg Charter as being particularly heinous and thus worthy of mention. The following were listed as crimes within the jurisdiction of the International Military Tribunal in its Charter:

WAR CRIMES: namely, violations of the laws or customs of war. Such violations shall include, but not be limited to, murder, ill-treatment or deportation to slave labor or for any other purpose of civilian population of or in occupied territory, murder or ill-treatment of prisoners of war or persons on the seas, killing of hostages, plunder of public or private property, wanton destruction of cities, towns or villages, or devastation not justified by military necessity[.]

Charter of the International Military Tribunal, Oct. 6, 1945, art. 6(b), *reprinted* in 10 TRIALS OF WAR CRIMINALS BEFORE THE NUERNBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW NO. 10, *supra* note 4, at XIII (1951). The "principles and spirit" of IHL should encompass the prohibitions against the commission of what are defined as "grave breaches" of the Geneva Conventions of 1949. A Commission of Experts characterized such grave breaches as "war crimes," and "the general notion of war crimes as comprising any violation of the law of international armed conflicts, sufficiently serious and committed with the requisite intent to be regarded as a crime." *Interim Report of the Commission of Experts Established Pursuant to Security Council Resolution 780* (1992), U.N. SCOR, 48th Sess., Annex I, at 15, U.N. Doc. S/25274 (1993). The "grave breaches" provisions of the Geneva Conventions of 1949, *supra* note 4, 6 U.S.T. at 3146, 3250, 3420, 3618, 75 U.N.T.S. at 62, 116, 238, 388 (arts. 50, 51, 130, and 147, respectively), only apply in the context of international armed conflict; however, armed conflict involving the United Nations is by definition international. *See infra* notes 100-57 and accompanying text. The grave breach provisions of the Geneva Conventions of 1949 articulate the following violations: willful killing; torture or inhuman treatment, including biological experiments; willfully causing great suffering or serious injury to body or health; extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly; compelling a prisoner of war or a civilian to serve in the forces of a hostile power; willfully depriving a prisoner of war or a civilian of the rights of fair and regular trial; unlawful deportation or transfer or unlawful confinement of a civilian. *See Geneva Conventions of 1949, supra* note 4, 6 U.S.T. at 3146, 3250, 3420, 3618, 75 U.N.T.S. at 62, 116, 238, 388 (arts. 50, 51, 130, and 147, respectively).

Finally, the United Nations should certainly be deemed bound by customary IHL where there is evidence of past practice on the part of the Organization. Where there has been past adherence to customary IHL norms by the United Nations, the Organization should bear a heavy burden of explaining why it is not obligated to comply or capable of complying.

93. In the context of Tom Franck's rule legitimacy analysis, a "rule" with no content at all is a rule of total indeterminacy. As a consequence, Professor Franck's rule compliance model would predict that such a rule would command little, if any, compliance. *See FRANCK, supra* note 14, at 50-66.

"norm" cannot provide guidance to troops, protected persons, or monitoring entities.⁹⁴ It is for this specific reason that the Geneva Conventions of 1949⁹⁵ and their protocols⁹⁶ expressly call for wide dissemination of IHL rules, a position regularly echoed by the ICRC since 1869⁹⁷ and by the U.N. Secretary-General.⁹⁸ Failure to adequately disseminate such norms in advance of armed conflict increases the likelihood of violations and emphasizes the humanitarian system's weakest link: *post facto* punishment.⁹⁹ The unwillingness of the Organization to agree on or articulate the content of the term "principles and spirit" prevents the Organization from being held accountable for its actions.

D. Why Attacks Against U.N. Peacekeepers Are Protected by the Combatant's Privilege and May Not Be Criminalized

The United Nations avoids its humanitarian obligations in yet another way when it intervenes in civil wars. When the United Nations engages in armed conflict with rebel forces, it wrongly applies the special set of rules that bind states involved in civil wars, instead of the rules that bind parties to international armed conflict.¹⁰⁰ This approach ostensibly allows

94. See Jacques Meurant, *Dissemination and Education*, 9 AUSTL. Y.B. INT'L L. 364 (1985).

95. See Geneva Conventions of 1949, *supra* note 4, 6 U.S.T. at 3146, 3248, 3418, 3616, 75 U.N.T.S. at 62, 114, 236, 386 (arts. 47, 48, 127, and 144, respectively).

96. See Protocol I, *supra* note 70, art. 83, 1125 U.N.T.S. at 76, 16 I.L.M. at 1427; Protocol II, *supra* note 76, art. 19, 16 I.L.M. at 1448.

97. See, e.g., International Comm. of the Red Cross, *Report on the Protection of War Victims*, 296 INT'L REV. RED CROSS 391, 408 & n.5 (1993) ("The dissemination of knowledge of international humanitarian law must begin in peacetime, for there is no chance of it being applied unless it is known by those whose duty it is to comply and ensure compliance with it."); *cf. id.* 411-12 ("Training for the armed forces").

98. See *Respect for Human Rights in Armed Conflict (I)*, *supra* note 5, ¶ 117, at 41 ("The wide dissemination of and publicity for international instruments of a humanitarian character and for the corresponding rules and regulations adopted at the national level would appear to be a particularly significant measure to ensure their better application").

99. *Cf.* Sadako Ogata, United Nations High Commissioner for Refugees, Statement at the I.C.R.C. Conference for the Protection of War Victims (Geneva), *reprinted in* 296 INT'L REV. RED CROSS 373 (1993) (existing IHL is not being fully implemented); Cpt. Ashley Roach (Ret.), Remarks at the Eleventh Annual Seminar on International Humanitarian Law for Diplomats Accredited to the United Nations (Jan. 19, 1994) (notes on file with the author) (existing IHL is not being fully implemented) [hereinafter Remarks of Cpt. Ashley Roach]; Charney, *supra* note 44. The Secretary-General has noted that the ultimate purpose of humanitarian law is to prevent violations; the process of sanctioning violators is not an end unto itself. See *Respect for Human Rights in Armed Conflict (I)*, *supra* note 5, ¶ 203, at 63.

100. The principal difference between the international and civil war IHL regimes is that with the former, each combatant is vested with the "combatant's privilege," i.e., each soldier that falls within the definition of a combatant is entitled to kill or wound enemy combatants without committing a crime. Should that soldier be captured, s/he is entitled to prisoner of war (PW) status. In contrast, the civil war regime allows the state to criminalize insurrection, i.e., those taking up arms against the government of the state are not entitled to kill or wound

the United Nations to treat as criminal attacks against its forces that would otherwise be privileged as a matter of IHL.¹⁰¹ As a matter of law, the

government soldiers and are subject to criminal punishment, often the death penalty for treason or murder, if they do so. See Geneva Conventions of 1949, *supra* note 4, 6 U.S.T. at 3116-18, 3220-22, 3318-20, 75 U.N.T.S. at 32-34, 86-88, 136-38 (common art. 3); Solf, *supra* note 64, at 291-94; Clarke et al., *supra* note 72, at 107-08, 117-18.

101. The application by the United Nations of the civil war IHL regime is evidenced in a number of instances in which the United Nations has treated as illegal actions that would be permitted under the international regime as falling within the combatant's privilege. For example, the United Nations did not recognize captured members of General Aidid's forces as being entitled to PW status. Cf. Les Aspin, U.S. Secretary of Defense, Statement at Department of Defense Newsbriefing (Oct. 4, 1993), available in LEXIS, News Library, Scripts File (characterizing captured members of hostile Somali forces as "detainees"). The United Nations also did not recognize as prisoners of war those members of its own forces in the hands of General Aidid's forces. *Id.*; Les Aspin, U.S. Secretary of Defense, Interview with Bryant Gumble, *Today Show* (NBC television broadcast, Oct. 8, 1993) (transcript on file with author) (characterizing captured U.S. airman as "detainee").

In the report prepared by Tom Farer for the U.N. Secretariat on the June 5, 1993 attack on UNOSOM II troops, he states that "[n]o act could by its very character more perfectly exemplify an international crime than the use of force against United Nations soldiers to prevent them from carrying out their responsibilities." *Report Pursuant to Paragraph 5 of Security Council Resolution 837 (1993) on the Investigation into the 5 June 1993 Attack on U.N. Forces in Somalia on Behalf of the Secretary-General*, Annex, *supra* note 79, ¶ 7, at 3. While the author agrees that such an attack could constitute a crime as a matter of the *jus ad bellum*, Mr. Farer makes clear that those guilty of criminal action would include "persons who organized, planned, approved or executed the attack[.]" i.e., the soldiers in the field. *Id.*

Indirect application of the civil war regime is evidenced further by U.N. treatment as illegal under Somali law, attacks by soldiers in the field who, pursuant to the orders of rebel commanders, have attacked U.N. forces. See *id.* at 3 (applicability of Somali law to persons who "executed the attacks"); *id.* at 4-7 (description of the attack). This application of Somali law serves indirectly to apply the civil war regime because it allows the prescriptive authority of the Somali state to define the relationship between U.N. forces and those forces with which the United Nations is in combat; the net effect is to criminalize attacks against U.N. armed forces. Similarly, status of forces agreements between the United Nations and host states, have, by their terms, required host states to act to deter and prosecute all persons responsible for attacks on U.N. forces. See, e.g., *Report by the Secretary-General on the Organization and Operation of the United Nations Peace-Keeping Force in Cyprus*, U.N. SCOR, 19th Sess., Annex I, ¶ 18, U.N. Doc. S/5634 (1964) (providing, *inter alia*, that "[t]he Government [Cyprus] will ensure the prosecution of persons subject to its criminal jurisdiction who are accused of acts in relation to the Force or its members which, if committed in relation to the Cypriot army or its members, would have rendered them liable to prosecution.") (emphasis added), reprinted in 4 HIGGINS, *supra* note 2, at 212, 214-15 (1981). That the United Nations seeks to stand in the shoes of the host state with respect to immunity from attack in civil conflict is made express in the model status of forces agreement as well, which states that "[t]he government shall ensure the prosecution of persons subject to its criminal jurisdiction who are accused of acts in relation to the United Nations peace-keeping operation or its members which, if committed in relation to the forces of the Government, would have rendered such acts liable to prosecution." *Comprehensive Review of the Whole Question of Peace-Keeping Operations in All Their Aspects, Model Status-of-Forces Agreement for Peace-Keeping Operations: Report of the Secretary-General*, U.N. GAOR, 45th Sess., Agenda Item 76, ¶¶ 44-45, U.N. Doc. A/45/594 (1990) (emphasis added) [hereinafter *Comprehensive Review*]. Moreover, as an outgrowth of the U.N. General Assembly's review of peacekeeping in all its aspects, the General Assembly has adopted an international convention concerning the status and safety of U.N. personnel, including members of U.N. forces, that purports to create a new rule of international law that would criminalize attacks on U.N. forces that are otherwise protected by IHL. See *infra* notes 143-58 and accompanying text.

United Nations is always subject to the IHL regime applicable to international conflicts, which recognizes such attacks as privileged, even when the United Nations intervenes in civil wars. The Organization may not avoid this obligation by relying on the host state's municipal law criminalizing acts of insurrection, because the host state lacks jurisdiction to apply its law to attacks on U.N. forces deemed privileged by IHL.¹⁰² Neither can the Organization rely on new conventional law that purports to criminalize attacks on U.N. forces or otherwise modify the combatant's privilege as it applies to the United Nations, where such conventional law does not evidence a change in the customary IHL regime by which the United Nations is bound. In theory, customary IHL could be changed to either (i) modify the jurisdictional reach of IHL to allow a state to apply its municipal law to criminalize attacks on U.N. forces intervening in civil wars, or (ii) modify the substantive IHL provisions defining the combatant's privilege to exclude from the privilege the right to attack U.N. forces intervening in civil wars. A convention that does not evidence a change in customary IHL can not achieve these effects as a matter of treaty law between its parties because all states, not just the convention parties, are beneficiaries of customary IHL obligations owed *erga omnes* as a matter of customary law.¹⁰³ While the recently adopted Convention on the Safety of United Nations and Associated Personnel¹⁰⁴ purports to modify international law by criminalizing certain attacks now falling within the combatant's privilege, it does not achieve either of the foregoing objectives. Thus, as a matter of existing IHL rules, U.N. armed forces engaged in armed conflict must, among other things, recognize a combatant's privilege and right to prisoner of war status vested in their opponents in the field.¹⁰⁵

102. See *infra* notes 107–31 and accompanying text. Prescriptive jurisdiction has been allocated by treaty between states, *cf.* Convention on Offences and Certain Other Acts Committed on Board Aircraft, Sept. 14, 1963, 20 U.S.T. 2941, 704 U.N.T.S. 219 (anti-air piracy); Convention for the Suppression of Unlawful Acts Against Safety of Civil Aviation, Sept. 23, 1971, 24 U.S.T. 564, 10 I.L.M. 1151 (anti-air piracy), but these examples involve the trading of jurisdiction possessed by the treaty parties. They do not involve the transfer or extinguishing of the jurisdictional rights of states *not* party to the convention in question. Such an analysis is appropriate in the case of the United Nations and a host state which, as was discussed, operate on the same horizontal plane with respect to considerations of IHL. See *supra* notes 25–48 and accompanying text.

103. See *infra* notes 155–57 and accompanying text.

104. Convention on the Safety of United Nations and Associated Personnel, *opened for signature* Dec. 9, 1994, 34 I.L.M. 484.

105. Whereas commentators have noted that civil war IHL norms do not provide for individual criminal responsibility in cases involving grave breaches of those norms, individual criminal responsibility for grave breaches is found in the international regime. It is the international regime that applies to conflicts involving U.N. forces and insurgents, thereby offering some protection to U.N. forces in that regard. See Bassiouni, *supra* note 44; *supra* note 92.

In the discussion that follows, it is important to recall that in a multiparty conflict, each of the individual component bilateral "armed conflicts" must be characterized either as "international" or not.¹⁰⁶ Thus, it is necessary to identify the bilateral conflict in question before characterizing it.

A principal function of international law is the regulation of extra-territorial assertions of jurisdictional authority by states¹⁰⁷ and the correlative prevention of conflicts between states.¹⁰⁸ As a general matter, the state exerts exclusive and absolute power within its boundaries¹⁰⁹ and may express that power and authority through acts of prescription defining the relationships between private persons and between private and public persons within the state, which comprise the state's political and social

106. In the *Case Concerning the Military and Paramilitary Activities in and Against Nicaragua*, the International Court of Justice stated that for the purposes of IHL, an otherwise multi-party conflict could differ in character in terms of being international or not with respect to the component conflicts between any two parties. See *Military and Paramilitary Activities in and Against Nicaragua* (Nicar. v. U.S.), 1986 I.C.J. 14, ¶ 219 (June 27), reprinted in 25 I.L.M. 1023 (1986) (characterizing the conflict between Contra and Nicaraguan government forces as not of an international character, while characterizing the conflict between United States and Nicaraguan government forces as international in character); see also Dietrich Schindler, *International Humanitarian Law and Internationalized Internal Armed Conflicts*, 230 INT'L REV. RED CROSS 255, 256-61 (1982) (discussing characterization as international or internal the various component conflicts that comprised the Vietnam and Afghanistan conflicts.) But see *Interim Report of the Committee of Experts, Letter Dated 9 February 1993 From the Secretary-General Addressed to the President of the Security Council*, U.N. SCOR, 48th Sess., Annex I, ¶¶ 44-45, at 14, U.N. Doc. S/25274 (1993) (The report does not treat component conflicts as distinct; rather, it concludes that

the character and complexity of the armed conflicts concerned, combined with the web of agreements on humanitarian issues the parties have concluded among themselves, justify an approach whereby it applies the law applicable in international armed conflicts to the entirety of the armed conflicts in the territory of the former Yugoslavia.

However, this is a non-traditional approach.).

107. See generally Frank Visser, *General Course on Private International Law*, 232 R.C.A.D.I. 13, 201 (1992); Gerald Fitzmaurice, *The General Principles of International Law Considered from the Standpoint of the Rule of Law*, 92 R.C.A.D.I. 1 (1957); Andrew L. Strauss, *Beyond National Law: The Neglected Role of the International Law of Personal Jurisdiction in Domestic Courts*, 36 HARV. INT'L L.J. 373 (1995) (discussing *inter alia*, state sovereignty as the incorporeal manifestation of jurisdictional prerogative and the role of international law in regulating conflicts between sovereigns).

108. See Hedley Bull, *The Continuing Validity of the Rule of Non-Intervention*, in INTERVENTION IN WORLD POLITICS 181, 184 (Hedley Bull ed., 1984).

109. But see Strauss, *supra* note 107, at 393 n.71.

order.¹¹⁰ The international community recognizes these prescriptions and characterizes them as acts taken within the state's realm of sovereignty, its *domaine réservé* as a matter of international law.¹¹¹ Thus, international law prohibits one state from interfering in the internal affairs of another state,¹¹² including the social and political order of that other state — a proscription that applies to the United Nations and its armed forces.¹¹³

110. A state's jurisdiction to prescribe constitutes the state's jurisdiction "to make its law applicable to the activities, relations, or status of persons . . . whether by legislation, by executive act or order, by administrative rule or regulation, or by determination of a court." RESTATEMENT (THIRD), *supra* note 4, § 401 (defining jurisdiction to prescribe, adjudicate, and enforce); *see generally*, Benedetto Conforti, *The Principle of Non-Intervention*, in INTERNATIONAL LAW: ACHIEVEMENTS AND PROSPECTS, *supra* note 26, at 467.

111. This paper concerns itself with the prescriptive acts of a state with effects wholly within the territory of that state. The right to determine the political order within a state has been interpreted by the U.N. General Assembly as falling essentially within the domestic jurisdiction of that state. *See Declaration on the Inadmissibility of Interference into Internal Affairs of States and on the Protection of Their Independence and Sovereignty*, G.A. Res. 2131, U.N. GAOR, 20th Sess., Supp. No. 21, at 11–12, U.N. Doc. A/6014 (1965); *cf. Declaration on the Granting of Independence to Colonial Countries and Peoples*, G.A. Res. 1514, U.N. GAOR, 15th Sess., Supp. No. 16, at 66, U.N. Doc. A/4684 (1961) ("All peoples have the right to self determination: by virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development").

Substantive choices as to the political order within a state are to be distinguished from the process by which such choices are made. The process by which a political order is constituted must conform to the emerging democratic entitlement, a right which is held by the citizens of a state with respect to the government of that state. *See* Thomas M. Franck, *The Emerging Right to Democratic Governance*, 86 AM. J. INT'L L. 46–47 (1992); Gregory H. Fox, *The Right To Political Participation in International Law*, 17 YALE J. INT'L L. 539 (1992).

International human rights and humanitarian law stand as further exceptions to the rule that a state may order the relations between citizens and the relations between government and its citizens as it sees fit. *See* RESTATEMENT (THIRD), *supra* note 4, pt. VII, introductory note; Strauss, *supra* note 107, at 393 n.71; *see also* Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), 1986 I.C.J. 14, ¶¶ 218–19 (June 27), *reprinted* in 25 I.L.M. 1023 (1986).

112. *See* Bull, *supra* note 108.

113. U.N. CHARTER art. 2(1) provides that "[t]he Organization is based on the principle of the sovereign equality of all its Members." Thus, as an organization comprised of states, the United Nations may not interfere in another state's domestic realm. Moreover, the Charter expressly limits interference by the Organization "in matters which are essentially within the domestic jurisdiction of any state[.]" while acknowledging that such a limitation "shall not prejudice the application of enforcement measures under Chapter VII." U.N. CHARTER art. 2(7).

For example, with regard to UNEF I, the Secretary-General noted the following:

A rule closely related to the one last mentioned, and reflecting a basic Charter principle, precludes the employment of United Nations elements in situations of an essentially internal nature. As a matter of course, the United Nations personnel cannot be permitted in any sense to be a party to internal conflicts. Their role must be limited to external aspects of the political situation as, for example, infiltration or other activities affecting international boundaries.

Summary Study of the Experience Derived from the Establishment and Operation of the Force: Report of the Secretary-General, U.N. GAOR, 13th Sess., Agenda Item 65(c), Annex, ¶ 166, U.N. Doc. A/3943 (1958).

The mandate of the U.N. force in the Congo also reflected the obligation not to interfere in the internal affairs of states, although this obligation turned out to be difficult to respect in

practice in the context of a disintegrating Congo. See generally 3 HIGGINS, *supra* note 2, at 14-60; Thomas M. Franck, *United Nations Law in Africa: The Congo Operation as a Case Study*, 27 L. & CONTEMP. PROBS. 632 (1962). Speaking of ONUC, the Secretary-General noted: "United Nations units must not become parties in internal conflicts, [and] they can not be used to enforce any specific political solution of pending problems or to influence the political balance decisive to such a solution." *First Report of the Secretary-General on the Implementation of Security Council Resolution S/4387 of 14 July 1960*, U.N. SCOR, 15th Sess., Supp. for July-Sept. 1960, ¶ 13, U.N. Doc. S/4389 (1960). This position was "reaffirmed" in resolution S/4426. See S.C. Res. S/4426, U.N. SCOR, 15th Sess., Supp. for July-Sept. 1960, ¶ 4, U.N. Doc. S/4426 (1960). Secretary-General Hammarskjöld further characterized such interference as "shift[ing] the weights between personalities or groups or schools of thought in a way which would prejudice the solution of the internal political problem." See *Second Report of the Secretary-General on the Implementation of Security Council Resolution S/4387 of 14 July 1960 and S/4405 of 22 July 1960*, U.N. SCOR, 15th Sess., Supp. for July-Sept. 1960, ¶ 10, U.N. Doc. S/4417 (1960).

Higgins notes that the obligation not to interfere in the internal affairs of the Congo remained a hurdle for the various U.N. organs because ONUC never took the form of an enforcement measure under Charter articles 41 or 42. See 3 HIGGINS, *supra* note 2, at 54-60 (reviews the arguments for and against this conclusion). ONUC's mandate, *inter alia*, to "restore law and order," S.C. Res. S/4405, U.N. SCOR, 15th Sess., Supp. for July-Sept. 1960, at 34, U.N. Doc. S/4405 (1960) (interpreted as a *de facto* mandate), and to use "all appropriate measures to prevent the occurrence of civil war in the Congo," S.C. Res. S/4741, U.N. SCOR, 16th Sess., Supp. for Jan.-Mar. 1961, at 147, U.N. Doc. S/4741 (1961), as well as the positions taken by the United Nations condemning Katanga's secession and recognizing the Government of the Republic of the Congo, see S.C. Res. S/5002, U.N. SCOR, 16th Sess., Supp. for Oct.-Dec. 1961, at 148, U.N. Doc. S/5002 (1961), appear to have conflicted with the obligation not to interfere in the internal affairs of the Congo. However, the ONUC mandate was, in theory, reconciled with the non-interference principle on the grounds that ONUC action was directed only toward the remediation of threats to international peace and security. Speaking of the "mandate" to assist the government of the Congo with the maintenance of law and order, the Secretary-General stated:

The legal justification for the Council decision was the threat to peace and security which arose as a result of the intervention of Belgian troops in the Congo; this intervention, in turn, occurred purportedly because of the widespread internal disorders in the country. Consequently, to bring about the withdrawal of the Belgian troops, it was considered necessary, in response to the request of the Government of the Republic of the Congo, to introduce United Nations troops to assist the restoration of internal order and security.

U.N. SCOR, 15th Sess., 913th mtg. ¶ 25, at 5, U.N. Doc. S/PV.913 (1960). In another sense, to the extent the secession of Katanga threatened the territorial integrity of the Congo, and derivatively, international peace and security, the Security Council was empowered to condemn the secession. While condemnation of secession might otherwise have constituted interference in the civil conflict, the impact on international peace and security renders the U.N. action not "essentially within the domestic jurisdiction" of the Congo. Nonetheless, Hammarskjöld recognized that peaceful interposition of troops alone inevitably would be *perceived* as favoring one or the other side in the civil conflict, see U.N. GAOR, 15th Sess., pt. 1, 957th mtg. ¶ 17, U.N. Doc. A/PV.957 (1961), and that the use of force by the United Nations would, *de facto*, favor one side over the other, see *Second Report of the Secretary-General on the Implementation of Security Council Resolution S/4387 of 14 July 1960 and S/4405 of 22 July 1960*, *supra*, ¶ 10.

UNOSOM II, by contrast, operated as a Chapter VII "enforcement" action, and thus was not subject to the limitations of Article 2(7). See S.C. Res. 814, *supra* note 2. Nonetheless, some commentators suggest that the Security Council's ability to invoke the enforcement powers of Chapter VII and to free the United Nations fully from the rule of non-interference is itself subject to legal limits. See, e.g., J.S. Watson, *Autointerpretation, Competence, and the Continuing Validity of Article 2(7) of the U.N. Charter*, 71 AM. J. INT'L L. 60 (1977); Thomas

"International armed conflict" is that armed conflict in which the extraterritorial effects of state action reach a threshold point where they threaten the international order.¹¹⁴ Conflict is often said to be "international" when two "subjects of international law" are in conflict,¹¹⁵ but this analysis is merely a shorthand way of describing the general class of situations in which one state is necessarily disturbing the international order by asserting its own authority, in the form of armed force, within the sovereign realm of another state, whether rightfully or wrongfully, and without the consent of the "host" state.¹¹⁶ On the other hand, "pure" civil

M. Franck, *The "Powers of Appreciation": Who Is the Ultimate Guardian of U.N. Legality?*, 86 AM. J. INT'L L. 519 (1992).

In a recent report of the General Assembly's Special Committee on Peace-Keeping Operations, the Committee emphasized that "respect for the principles of sovereignty, territorial integrity and political independence of States and non-intervention in matters that are essentially within the domestic jurisdiction of any State is crucial to common efforts, including peace-keeping operations, to promote international peace and security." *Report of the Special Committee on Peace-Keeping Operations*, U.N. GAOR, 49th Sess., Agenda Item 1, Annex, ¶ 44, U.N. Doc. A/49/136 (1994). The Committee noted further the "importance of . . . the need for United Nations operations to continue to fulfil their mandates impartially." *Id.* ¶ 49.

114. See LOUIS HENKIN, *HOW NATIONS BEHAVE* 154 (2d ed. 1979) ("Prohibitions of intervention and interference, it should be clear, are part of the quest for an ideal of equally sovereign and independent nations. . . . Some act of any nation may reverberate everywhere. Big powers, in particular, affect domestic affairs in other nations by their mere existence."); OPPENHEIM'S INTERNATIONAL LAW §§ 53-56, 58-59 (Hersch Lauterpacht ed., 7th ed. 1952); COMMENTARY ON THE GENEVA CONVENTION FOR THE AMELIORATION OF THE CONDITION OF THE WOUNDED AND SICK IN ARMED FORCES IN THE FIELD 39-50 (Jean S. Pictet ed., 1952) [hereinafter ICRC GENEVA (I) COMMENTARY]; cf. *supra* notes 106-11 and accompanying text.

115. See, e.g., Schindler, *supra* note 106, at 258; cf. W. Michael Reisman & James Silk, *Which Law Applies to the Afghan Conflict?*, 82 AM. J. INT'L L. 459, 466 (1988) (mentioning the applicability of Geneva and Hague law to conflicts between an established government and a state intervening on behalf of the opposition, as well as to conflicts between states intervening on opposing sides in a civil war); Hans-Peter Gasser, *Internationalized Non-International Armed Conflicts: Case Studies of Afghanistan, Kampuchea, and Lebanon*, 33 AM. U. L. REV. 145, 147 (1983) (discussing the same point); OPPENHEIM'S INTERNATIONAL LAW, *supra* note 12, § 56, at 203 (discussing "war" in the sense of international conflict as a contention between states).

116. See *supra* notes 106-11 and accompanying text. The exception is the case of intervention by invitation of the host state. The traditional view of "state" or "absolutist" sovereignty views the sovereignty of the state as vested in the *de facto* government of the state. See Fox, *supra* note 111, at 550. The *de facto* government of a "host" state is thus entitled to invite a third state to lend assistance in the form of armed force to suppress rebellion by citizens of the host state without violating the sovereignty of or interfering in the internal affairs of the host state. See Richard A. Falk, *International Law and the United States Role in the Vietnam War*, 75 YALE L.J. 1122, 1127 (1965-66) ("Traditional international law permits military assistance to the incumbent regime during early stages of an internal challenge."). Pursuant to the state sovereignty approach, there is no violation of sovereignty or interference in the internal affairs of the state so long as the third state forces continue to operate within the scope of the host state's consent. See HENKIN, *supra* note 114, at 306-07 ("[S]uch external intervention is not obviously a violation of Article 2(4) of the U.N. Charter as a use of force against the political independence or territorial integrity of another state, if the support was *bona fide* and the intervenor was not seeking to dominate the side it supported and establish a puppet regime."); Schindler, *supra* note 106 (discussing forcible installation of a new government through the intervention of a foreign State); cf. Reisman & Silk, *supra* note 115 (discussing the *de facto* takeover of the Afghan government).

war, that is, civil war without cross-border effects that threaten the international order, is treated by the international community as essentially within the domestic jurisdiction of the state.¹¹⁷ In the context of civil wars, the international community recognizes the state's jurisdiction to prescribe rules that define the relationship between the state and its rebellious citizens, including rules that define their rebellion as criminal.¹¹⁸ At the threshold of international armed conflict, the international community ceases to defer to the individual state's legal characterization of the rebellion; instead, the international community asserts its own rules and interests in regulating conflictive conduct.

By definition, the boundaries of the *jus ad bellum* manifest the jurisdictional boundaries between civil war and international conflict — between the conflicts limited to the sovereign realm of the state and the conflicts that so disturb the international order that they fall within the jurisdiction of international law.¹¹⁹ *Jus ad bellum* rules have evolved specifically to address those circumstances where the international community has decided that its interests are at stake, whether those rules deem the conduct of a particular party to an armed conflict to be lawful or unlawful.¹²⁰ IHL, in turn, incorporates the characterization of conflict as international or internal as reflected in the *jus ad bellum*.¹²¹ Moreover,

An alternative concept of sovereignty denoted "popular sovereignty," expresses the view that a government's legitimacy is derived from its people. See Fox, *supra* note 111 (discussing the traditional and popular models of state sovereignty in the context of reviewing the process by which the U.N. credentials its delegates). Popular sovereignty is a conceptual limitation on the right of a government to act for the state and to authorize the use of a foreign state's armed force against the government's own citizens.

117. See *supra* notes 106–11. In fact, the definition of civil conflict found in Article 3 of the Geneva Conventions of 1949 defines civil war in terms of what it is not, i.e., "armed conflict not of an international character." See Geneva Conventions of 1949, *supra* note 4, 6 U.S.T. at 3116–18, 3220–22, 3318–20, 75 U.N.T.S. at 32–34, 86–88, 136–38 (common art. 3); ICRC GENEVA (I) COMMENTARY, *supra* note 114, at 39–50.

118. See *supra* notes 64, 72, 107–111.

119. See *supra* notes 27–28. The author defines the term broadly to encompass that body of law by which the use or threat of armed force by one state against another is either prohibited or deemed justified. This would include articles 2(4) and 51 of the U.N. Charter, as well as the various doctrines of intervention. See generally Oscar Schachter, *The Right of States to Use Armed Force*, 82 MICH. L. REV. 1620 (1984); Ronald St. J. MacDonald, *The Use of Force by States in International Law*, in INTERNATIONAL LAW: ACHIEVEMENTS AND PROSPECTS, *supra* note 26, at 717; INTERVENTION IN WORLD POLITICS, *supra* note 108.

120. For the purposes of this article, it is not necessary to determine precisely where the line between civil and international conflict lies. Indeed, the precise definition of the demarcation between the two is not certain and subject to continuing evolution and debate. See Nationality Decrees Advisory Opinion, 1923 P.C.I.J. (ser. B) No. 4 (Feb. 7). It is sufficient for the purposes of this article to demonstrate that with regard to armed conflict between U.N. forces on one hand and either government or rebel forces on the other, the rules governing such conflict are those mandated by international law and not by a state rule.

121. See, e.g., Schindler, *supra* note 106, at 256–61. Whether the international or civil war IHL regime applies to a given conflict is a consequence of the characterization of a conflict as

because of the status enjoyed by the principle of humanity in the normative hierarchy of international law,¹²² the applicability of IHL rules must be construed at least as broadly as that of *jus ad bellum* rules.¹²³

When the United Nations intervenes in a civil war, it is the *jus ad bellum* that prescribes and delimits the right of the Organization to engage in armed conflict with rebel forces, whether that armed conflict is offensive or defensive in nature.¹²⁴ Thus, the lawfulness of U.N. armed conflict is defined with reference to mandatory rules of international law, which include the resolutions of the Security Council itself, not permissive rules that allow the host state to define, in its own discretion and by way of its own municipal law, the scope of U.N. conduct.¹²⁵ On one level, this must be true because the United Nations is constituted as a matter of international law¹²⁶ and Charter and Charter-based processes.¹²⁷ Thus, U.N.

international or internal. See *id.* That this is true is evident further in the fact that IHL applies the more restrictive regime to civil wars, despite the conclusion of many commentators that the objective cruelty present in civil war is greater than that present in international conflict and should require at least a similarly detailed set of rules. See, e.g., ICRC GENEVA (IV) COMMENTARY, art. 3, *supra* note 76, at 27; *Respect for Human Rights in Armed Conflict* (I), *supra* note 5, ¶ 9. However, the internal IHL regime does take into account the more limited capacity of rebel forces to observe the laws and customs of war. See G.I.A.D. Draper, *Humanitarian Law and Internal Armed Conflicts*, 13 GA. J. INT'L & COMP. L. 253, 268-70 (1983).

While the international IHL regime applies in the same circumstances that *jus ad bellum* rules apply, the internal IHL represents a further intrusion into the domestic realm. See *supra* note 76. With regard to the minimum protection required by the civil war IHL regime, no armed conflict can truly be considered to fall solely within the *domaine réservé* as a matter of IHL.

122. See *supra* notes 11-48 and accompanying text.

123. Cf. *Symposium: Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights*, *supra* note 47, at 1.

124. See *supra* note 113 (discussing the international law grounds for U.N. intervention in civil conflict); Ruth Gordon, *United Nations Intervention in Internal Conflicts: Iraq, Somalia, and Beyond*, 15 MICH. J. INT'L L. 519 (1994); Mary Ellen O'Connell, *Continuing Limits on UN Intervention in Civil War*, 67 IND. L.J. 903 (1992); Paul C. Szasz, *Role of the United Nations in Internal Conflicts*, 13 GA. J. INT'L & COMP. L. 345 (1983).

125. The rules are "mandatory" in the sense that international law provides that intervention is or is not permitted. See *supra* note 113.

126. See RESTATEMENT (THIRD), *supra* note 4, § 221 cmt. a ("[A]n international organization is an inter-state organization, established by an international agreement governed by international law.")

127. However, the possibility exists of U.N. action *ultra vires* the Charter or U.N. action otherwise in violation of international law. See Watson, *supra* note 113; Franck, *The "Powers of Appreciation": Who is the Ultimate Guardian of U.N. Legality?*, *supra* note 113. Ultimately, the degree to which the international order is perturbed by an otherwise civil conflict is a function of the specific extra-territorial effects that a conflict engenders. See, e.g., *supra* note 124. However, in the case of illegal or *ultra vires* intervention by the United Nations, the analysis requiring application of the IHL regime would remain the same because the prohibition against U.N. intervention would itself exist as a matter of international law.

The United Nations can not intervene by invitation in a civil war and, as a consequence of the invitation, apply the civil war IHL regime and treat as criminal attacks against its own forces by rebels. In contrast, a third state can intervene by invitation and the civil war regime will apply to the conflict between the third state and rebels. The difference lies in the fact that

conflicts with rebel forces are "international" in character, despite the fact that the "two subjects of international law" test might suggest otherwise where a particular rebel movement is deemed not to be a subject of international law.¹²⁸ Even where a U.N. armed force engages in armed conflict *ultra vires* its Chapter VI or VII mandate, the conflict between the United Nations and a rebel force is international and the IHL regime governs the conflict. Fundamentally, the "international" character of the United Nations-insurgent relationship is defined with reference to the *source* of law authorizing U.N. action and defining the *jus ad bellum* rights of the conflictive parties, not the legality of the action and not the character of any particular *de facto* government involved. Therefore, the presence or absence — in Somalia, for example — of a functioning government does not present a special case entitling the United Nations to invoke the civil war IHL regime.¹²⁹

the United Nations may not operate under a mandate to serve merely as an arm of the government of a state in a civil war. See *supra* note 113 (discussing the scope of UNEF and ONUC mandates). This would cause the United Nations to fundamentally interfere in the political balance within the state, which it can not do. *Id.* Moreover, a third state which intervenes pursuant to the invitation of a host state must conform its actions to the scope of the invitation, whereas consent to U.N. intervention is predicated on an implied freedom of action on the part of the Organization. See Franck, *United Nations Law in Africa: The Congo Operation as a Case Study*, *supra* note 113, at 638–52. The "absolutist" view of sovereignty that allows a *de facto* government to define what constitutes interference in the internal affairs of the state is evident in U.N. recognition practice, see Fox, *supra* note 111, and U.N. organs have found specifically that the determination of the substantive political order within a state falls within the sovereign domain and therefore outside of the domain of the international community and U.N. jurisdiction. See *supra* note 111. However, the authority of the government to act for all political factions within a state so as to define the political order of the state is limited by the emerging democratic entitlement and its corollary principle of popular sovereignty. See Franck, *supra* note 111; Fox, *supra* note 111. Some commentators argue that the United Nations is in fact interfering in the internal affairs and with the political order of those states in which it intervenes. However, it is sufficient for the purposes of this article to note that such interference, to the extent that it occurs, does so pursuant to rules of international law and not through deference to the political order established by a *de facto* government. See, e.g., Gordon, *supra* note 124. Thus, the possibility of intervention by invitation and consequent invocation of the civil war IHL regime within the realm of the sovereign domain remains unavailable.

128. Customary law obligations substantially equivalent to those set forth in common article 3 of the Geneva Conventions of 1949 are held to unilaterally bind government and insurgent forces in civil war. See *Military and Paramilitary Activities in and Against Nicaragua* (Nicar. v. U.S.), 1986 I.C.J. 14, ¶¶ 218–19 (June 27), reprinted in 25 I.L.M. 1023 (1986); Solf, *supra* note 64, at 294–95. However, it is not clear how rebel forces can be considered bound to an international law norm when they, short of achieving status as a belligerent, are not considered subjects of international law. See Charles Lysaght, *The Scope of Protocol II and Its Relations to Common Article 3 of the Geneva Conventions of 1949 and Other Human Rights Instruments*, 33 Am. U. L. Rev. 9, 12 (1983–84). Such a weakness in theory demonstrates the inherent oversimplicity of the "two subjects of international law" test.

129. Where the United Nations has exercised governmental functions, its "interference" with regard to the political order of the state in question ostensibly was limited to the promotion of democratic process, not the prescription of rules within the democratic framework intended to favor one party over another. Nonetheless, the United Nations' role does necessarily favor certain factions at the expense of others. See Steven R. Ratner, *The Cambodia Settlement*

As a creature of international law, the United Nations has no "sovereignty," no "internal political order" or *domaine réservé* that it can claim is protected from the intrusion of international law.¹³⁰ Where international law would otherwise apply, the mere fact that the United Nations is involved does not render it inapplicable.

In accordance with the foregoing analysis, the United Nations may not treat as criminal the actions of rebel forces who attack U.N. forces by reference to prescriptions of the host state, because no host state can have jurisdiction to prescribe rules for a relationship which is governed by the mandatory rules of international law. A "host" state may not "waive" its own absence of jurisdiction; nor can the United Nations "waive" the absence of the state's jurisdiction or "consent" to the exercise of that state's jurisdiction because the allocation of jurisdiction is determined by the international community as a whole.¹³¹ Moreover, the United Nations, as a single subject of international law, does not itself have the customary lawmaking power to change the legal regime by which such jurisdiction is allocated.¹³²

Agreements, 87 AM. J. INT'L L. 1, 12-14, 22-25 (1993) (Cambodian sovereignty vested in the Supreme National Council involving all factions; U.N. had authority to override SNC with respect to civil administration "to the extent necessary to ensure the strict neutrality of the elections and to create the proper environment for holding them[.]"); Fox, *supra* note 111, at 575-76 (sovereignty of West Irian held by Netherlands and Indonesia jointly during the transition from Dutch to Indonesian rule; the U.N. played nothing more than a monitoring role).

130. "Sovereignty" exists as an attribute of states, distinct from the attributes of an international organization. See IAN BROWNLIE, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 287-88 (1990) (Sovereignty and Equality of States); RESTATEMENT (THIRD), *supra* note 4, § 223, cmt. a (international organizations "do not exercise powers implied in statehood and state sovereignty").

131. Cf. Strauss, *supra* note 107 (in the context of private international law, discussing the jurisdiction to adjudicate established by international law and why dualism can not be applied to allow states to direct their own courts not to apply the international law of jurisdiction).

132. *Id.* The allocation of jurisdiction between the sovereign and domestic realms is a function of customary law. Cf. RESTATEMENT (THIRD), *supra* note 4, pt. IV, introductory note. While the United Nations, as a subject of international law, see Blain Sloan, *General Assembly Resolutions Revisited (Forty Years Later)*, 58 BRIT. Y.B. INT'L L. 39, 133 (1987), is capable of a customary lawmaking act not in conformity with existing law, see D'AMATO, *supra* note 48, at 60 (describing an act that violates customary law as having the "seeds" of a new rule of law), the law can not be deemed changed without the implied consent of the community of states. In the words of Watson:

the power to make authoritative interpretations of Article 2(7) has not been yielded by states to the political organs of the United Nations and that . . . power of autointerpretation thus still rests with the member states[.] . . . [A]lthough other articles may be amenable to alternate modes of interpretation, a positivistic approach is necessitated by the unique nature of Article 2(7) as the intersection of both law and politics on the one hand, and domestic versus international jurisdiction on the other. . . . [W]hile one may adopt a dynamic approach toward lesser substantive rules, one cannot do so in connection with a principle that forms the basis for the overall allocation of competence within the system.

As a matter of substantive IHL, it is conceivable that the Security Council could create a *lex specialis* that would allow the United Nations to treat attacks upon itself as criminal and mandate application by its own forces of the internal IHL regime.¹³³ There is disagreement, however, over the existence of the Security Council's legislative power¹³⁴ and jurisdiction.¹³⁵ Moreover, the substance of such a rule would necessarily be premised on just the sort of utilitarian analysis prohibited by IHL, *vis-à-vis* that peace and security may be sought through the diminution of humanitarian rights for those in armed conflict.¹³⁶ In addition, any ability of the Security Council to change humanitarian law should not enable the Organization to abrogate peremptory norms that the international community could not also negate through the process of customary law making.¹³⁷

Watson, *supra* note 113, at 60. It seems unlikely that there will be endorsement by the international community of a great expansion of the sovereign realm to the detriment of the international community's own jurisdictional reach, and without such endorsement, no change in customary law can result. See RESTATEMENT (THIRD), *supra* note 4, § 102, cmts. b-c.

133. A decision of the Council under Chapter VII would be binding on all U.N. members pursuant to article 25 of the Charter. U.N. CHARTER art. 25.

134. A legislative act is a prescriptive act that can change directly the status of persons and things. See RESTATEMENT (THIRD), *supra* note 4, pt. 4, introductory note, § 401; see also S.C. Res. 955, U.N. SCOR, 49th Sess., 3453d mtg., U.N. Doc. S/RES/955 (1994) (establishing Rwandan Tribunal, and effectively legislating the applicability of Protocol II to Rwanda, which is not a party to Protocol II); S.C. Res. 687, U.N. SCOR, 46th Sess., 2981st mtg. ¶¶ 17, 29, U.N. Doc. S/Res/687 (1991) (The Security Council arguably exercised legislative power when it "[d]ecide[d] that all Iraqi statements made since 2 August 1990 repudiating its foreign debt are null and void[.]"); Paul C. Szasz, *New Ideas to Help Eliminate Nuclear Weapons*, DISARMAMENT TIMES, Nov. 24, 1992, at 570 (proposing Security Council "legislation" to prohibit further nuclear testing by states). But cf. Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808, U.N. SCOR, 48th Sess., ¶ 29, U.N. Doc. S/25704 (1993) (pointing out that in establishing a tribunal for the prosecution of persons responsible for serious violations of humanitarian law, "the Security Council would not be creating or purporting to 'legislate' that law.").

135. Under Chapter VII, there must exist a "threat to the peace, breach of the peace, or act of aggression" pursuant to which the Security Council may decide "what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security." U.N. CHARTER art. 39 (emphasis added). Article 41 states that "The Security Council may decide what measures not involving the use of armed force are to be employed to give effect to its decision, and may call upon the Members of the United Nations to apply such measures[.]" *Id.* art. 41; see generally Watson, *supra* note 113; Franck, *The "Powers of Appreciation": Who is the Ultimate Guardian of U.N. Legality?*, *supra* note 113.

The Article 25 obligation to abide by decisions of the Security Council is a treaty obligation among U.N. members, but one that binds virtually all members of the international community as a function of the almost universal membership in the United Nations. See U.N. CHARTER art. 25; *supra* note 16. Pursuant to Article 103, where there is a conflict between "the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter prevail." U.N. CHARTER, art. 103 (emphasis added). It remains unclear whether a decision of the Security Council can modify or override customary IHL.

136. See *supra* notes 11-48 and accompanying text.

137. For example, the Security Council should not be able to promulgate a rule providing that no quarter be given a peremptory rule of international law. See *supra* note 12 and accompanying text.

On December 9, 1994, without a vote, the U.N. General Assembly adopted and opened for signature a Convention on the Safety of United Nations and Associated Personnel.¹³⁸ As of November, 1995, thirty-five states have signed the treaty and four states have ratified or acceded to it.¹³⁹ The Convention purports to, *inter alia*, modify substantive IHL norms so as to criminalize attacks on U.N. peacekeepers otherwise protected by the combatant's privilege. While the Convention may ultimately achieve this goal, it can only do so to the extent that it serves as a medium for the modification of customary international law. The Convention may not modify substantive norms of IHL simply as a treaty operational between the parties thereto. While the acts of states in speaking for and voting for the adoption of a General Assembly resolution are traditionally held, in and of themselves, not to constitute sufficient state practice or evidence of *opinio juris* to crystallize a new rule of customary law, ratification of a treaty and other more substantial "acts" of conforming practice may evidence the emergence of a new customary rule, depending on the number and identities of the treaty parties.¹⁴⁰

By its terms, the Convention purports to modify existing IHL rules. Article 1 of the Convention establishes a category of persons denoted "United Nations personnel," which includes both military and civilian personnel.¹⁴¹ Under the Convention, both military and civilian personnel are declared immune from attack.¹⁴² The Convention effectively repeals the combatant's privilege.¹⁴³ soldiers in the field who attack U.N. military

138. See Convention on the Safety of United Nations and Associated Personnel, *supra* note 104.

139. *Multilateral Treaties Deposited with the Secretary-General, Status as at 31 December 1994*, *supra* note 15, Supplement. By its terms, the Convention enters into force 30 days after the deposit of 22 instruments of ratification, acceptance, approval or accession. Convention on the Safety of United Nations and Associated Personnel, *supra* note 104, art. 27, 34 I.L.M. at 493.

140. See generally D'AMATO, *supra* note 48; see also STEPHEN M. SCHWEBEL, THE LEGAL EFFECT OF RESOLUTIONS AND CODES OF CONDUCT OF THE UNITED NATIONS 3 (Forum Internationale No. 7, 1985) (evidencing a traditional view that looks principally to the practice of states and does not look to their "practice" as members of the General Assembly). But see Sloan, *supra* note 132 (taking a less traditional approach and arguing for consideration of state practice within the U.N. and consideration of elements of the resolutions themselves in the analysis of whether or not a resolution is law creating).

141. Convention Article 1 states that "[f]or the purposes of this Convention: (a) 'United Nations personnel' means: (i) Persons engaged or deployed by the Secretary-General of the United Nations as members of the military, police or civilian components of a United Nations operation." Convention on the Safety of United Nations and Associated Personnel, *supra* note 104, art. 1(a), 34 I.L.M. at 486.

142. Article 7 provides that "United Nations and associated personnel, their equipment and premises shall not be made the object of attack or of any action that prevents them from discharging their mandate." *Id.* art. 7(1).

143. See *supra* notes 68, 70, 72 and accompanying text.

personnel pursuant to the orders of their commanders are deemed to be committing a crime for which individual criminal liability is established.¹⁴⁴ In aid of prosecution, various Convention provisions address the sharing of information, extradition, and other forms of mutual assistance among the treaty parties.¹⁴⁵ The Convention relies on States Parties for adjudication and enforcement based on the exercise of state jurisdiction.¹⁴⁶ To the extent that the substantive violations established by the Convention become universally recognized as serious violations, resort by states to universal jurisdiction should be available as well.¹⁴⁷

The Convention does address, indirectly, the different roles played by military and non-military forces in armed conflict, stating that "military and police components of a United Nations operation and their vehicles,

144. Article 9 provides:

The intentional commission of:

(a) A murder, kidnapping or other attack upon the person or liberty of any United Nations or associated personnel;

(b) A violent attack upon the official premises, the private accommodation or the means of transportation of any United Nations or associated personnel likely to endanger his or her person or liberty;

(c) A threat to commit any such attack with the objective of compelling a physical or juridical person to do or to refrain from doing any act;

(d) An attempt to commit any such attack;

(e) An act constituting participation as an accomplice in any such attack, or in an attempt to commit such attack, or in organizing or ordering others to commit such attack,

shall be made by each State Party a crime under its national law.

Convention on the Safety of United Nations and Associated Personnel, *supra* note 104, art. 9, 34 I.L.M. at 488.

145. See, e.g., *id.* arts. 11 (prevention of crimes against United Nations and associated personnel, 12 (communication of information), 13 (measures to ensure prosecution or extradition), 14 (prosecution of alleged offenders), 15 (extradition of alleged offenders), 16 (mutual assistance in criminal matters), 34 I.L.M. at 489-91.

146. Compare RESTATEMENT (THIRD), *supra* note 4, §§ 402, 404, 421 with Convention on the Safety of United Nations and Associated Personnel, *supra* note 104, art. 10, 34 I.L.M. at 488-89, the text of which is as follows:

Establishment of Jurisdiction

1. Each State Party shall take such measures as may be necessary to establish its jurisdiction over the crimes set out in article 9 in the following cases:

(a) When the crime is committed in the territory of that State or on board a ship or aircraft registered in that State;

(b) When the alleged offender is a national of that State.

2. A State Party may also establish its jurisdiction over any such crime when it is committed:

(a) By a stateless person whose habitual residence is in that State; or

(b) With respect to a national of that State; or

(c) In an attempt to compel that State to do or to abstain from doing any act.

147. See RESTATEMENT (THIRD), *supra* note 4, § 404 & cmt. a (A state may "define and prescribe punishment for certain offenses recognized by the community of nations as of universal concern[.]").

vessels and aircraft shall bear distinctive identification.”¹⁴⁸ This meets the IHL test requiring combatants to display a “fixed distinctive sign, recognizable at a distance.”¹⁴⁹ Nonetheless, the Convention is marred by the same wilful confusion over the role of IHL and U.N. status vis-à-vis other parties to armed conflict. Convention signatories continue to traffic in the illusion that the international community can unilaterally prescribe the conduct of another combatant. The Convention purports to modify humanitarian law by ignoring the “*de facto* armed conflict” predicate of IHL and by defining certain armed conflicts as falling within the Convention’s protections and certain armed conflicts as falling without them.¹⁵⁰

The Convention contains an IHL “savings clause,” but it is a savings clause which itself raises questions. It reads as follows:

Nothing in this Convention shall affect: (a) The applicability of international humanitarian law and universally recognized standards of human rights as contained in international instruments in relation to the protection of United Nations operations and United Nations and associated personnel or the responsibility of such personnel to respect such law and standards.¹⁵¹

To the extent that the words “as contained in international instruments” are words of limitation, they again sidestep the fact that the United Nations is bound by customary obligations with what appears to constitute an oblique reference to the “principles and spirit” of IHL.¹⁵² Moreover, language found in international agreements purporting to limit U.N. obligations to those constituting the “principles and spirit” of IHL is only relevant to a discussion of U.N. customary obligations to the extent that such language affects *opinio juris* or practice. With regard to the operation of the savings clause, the question remains as to whether the Convention purports to modify the U.N.’s customary IHL obligations and whether it has done so. It is the author’s conclusion that, to date, an insufficient

148. Convention on the Safety of United Nations and Associated Personnel, *supra* note 104, art. 3(1), 34 I.L.M. at 487; see *supra* notes 72–73, 92 and accompanying text.

149. See *supra* note 70.

150. Article 2 states that the Convention does not apply to a United Nations operation “authorized by the Security Council as an enforcement action under Chapter VII of the Charter of the United Nations in which any of the personnel are engaged as combatants against organized armed forces and to which the law of international armed conflict applies.” Convention on the Safety of United Nations and Associated Personnel, *supra* note 104, art. 2(2), 34 I.L.M. at 486. This ignores the applicability of IHL to U.N. forces engaged in *de facto* armed conflict when acting in “self defense” under Chapter VI and VII mandates. On the other hand, it is another acknowledgment by the United Nations that IHL does apply to U.N. forces engaged in armed conflict authorized under Chapter VII.

151. *Id.* art. 20(a), 34 I.L.M. at 491.

152. See *supra* notes 85–99 and accompanying text.

number of states have ratified the Convention and there is insufficient practice in conformity with the Convention to conclude that customary IHL law has been modified so as to limit the combatant's privilege applicable to attacks on U.N. forces. While the Convention's approach ostensibly draws on the U.N.'s peacekeeping experience with status of forces agreements,¹⁵³ which obligate the host state to protect and prosecute attacks on U.N. personnel,¹⁵⁴ these status of forces agreements must suffer from the same jurisdictional infirmities that limit the effect of the Convention itself, because an agreement with the United Nations is itself a form of treaty.

The Convention purports to be effective between the parties even if a host state is not a party to the Convention.¹⁵⁵ This can not be so, because all of the beneficiaries of IHL are not party to the agreement, whether they be the protected parties or the states constituting the members of the international community and owed the obligations of IHL as customary obligations *erga omnes*. Although the Geneva Conventions of 1949¹⁵⁶ operate between the parties as a matter of conventional law even when other parties to the armed conflict are not so obligated, they do not purport to limit the customary law rights of treaty non-parties.¹⁵⁷

E. Why the Humanitarian Obligations of Troop Contributing States May Not Satisfy the United Nation's Own IHL Obligations

The United Nations further argues that troop contributing states are directly responsible for IHL violations committed by their contingents, implying that state obligations in some way supplant the IHL obligations of the United Nations.¹⁵⁸ This argument relies on a mischaracterization of

153. *Comprehensive Review*, *supra* note 101, at 2 n.d.

154. See *supra* note 101; *Elaboration Pursuant to Paragraph 1 of General Assembly Resolution 48/37 of 9 December 1993, of an International Convention Dealing with the Safety and Security of United Nations and Associated Personnel, with Particular Reference to Responsibility for Attacks on Such Personnel: Note by the Secretary-General*, U.N. GAOR 242d Ad Hoc Comm., 48th Sess., Agenda Item 5, ¶ 9, U.N. Doc. A/AC.242/1 (1993); cf. *Report of the Ad Hoc Committee*, U.N. GAOR Ad Hoc Comm. on the Elaboration of an Int'l Conv. Dealing with the Safety & Security of U.N. & Associated Personnel, 48th Sess. ¶¶ 20, 23, at 16, 17, U.N. Doc. A/AC.242/2 (1994).

155. See, e.g., *Convention on the Safety of United Nations and Associated Personnel*, *supra* note 104, art. 1(d) (defining "host state" without reference to Convention membership).

156. Geneva Conventions of 1949, *supra* note 4.

157. The fact that almost every state is a party to the Geneva Conventions of 1949 makes this a theoretical example and not a practical likelihood. See *supra* note 16.

158. See, e.g., *Respect for Human Rights in Armed Conflict (I)*, *supra* note 11, ¶ 114; Palwankar, *supra* note 3, at 230 (discussing a U.N. memorandum on the application and dissemination of the Geneva Conventions, dated Nov. 10, 1961). Evident again is the tendency

the legal relationships that exist between troop contributing states and those parties in conflict with U.N. forces, and between the United Nations and troop contributing states. Moreover, the position advocated by the United Nations would result in a total breakdown in the command and control structure of the U.N. force, rendering it ineffective.¹⁵⁹

The IHL paradigm establishes responsibility *as a function of* command and control. The existing humanitarian paradigm must hold the United Nations alone internationally responsible for violations committed by troops under its command and control. Only an entity that exercises command and control over military forces can order or fail to order compliance with humanitarian law, for example, what weapons are to be used, how civilian targets are to be avoided, and how prisoners of war and the wounded are to be treated.¹⁶⁰ The United Nations exercises exclusive

of the United Nations to define general issues and solutions involving IHL in terms of the various humanitarian conventions, which the Organization asserts that it can not join, *see supra* notes 50-55 and accompanying text, without mention of its customary obligations.

159. *See, e.g., Improving the Capacity of the United Nations for Peace-Keeping: Report of the Secretary General*, *supra* note 2, ¶ 26, at 7; *Comprehensive Review of the Whole Question of Peace-Keeping Operations in All Their Aspects*, U.N. GAOR Special Comm. on Peace-Keeping Operations, 49th Sess., Item 81 of Preliminary List, ¶¶ 23, 29-30, 56, at 6-7, 11, U.N. Doc. A/49/136 (1994). In a statement pertaining to the United Nations Emergency Force (UNEF) in the Sinai, the Secretary-General stated, "the Force is necessarily under the exclusive command of the United Nations, vested in the Secretary-General under the control of the Security Council. . . . A departure from this principle would seriously endanger the impartiality of the United Nations and of the operation." *First Report of the Secretary-General on the Implementation of Security Council Resolution S/4387 of 14 July 1960*, *supra* note 113, ¶ 7; *see* Remarks of Cpt. Ashley Roach, *supra* note 99; *cf.* High Command Case, *supra* note 4, at 516 (noting the objection of certain German High and Field Commanders that implementation of illegal orders would destroy the army's discipline).

160. *See* Hague Convention (IV), *supra* note 4, art. 3, 2 AM. J. INT'L L. at 93, DOCUMENTS ON THE LAWS OF WAR at 46 ("A belligerent party which violates the provisions of the said Regulations shall, if the case demands, be liable to pay compensation. It shall be responsible for all acts committed by persons forming part of its armed forces."); ICRC GENEVA (IV) COMMENTARY, *supra* note 76, art. 1, at 16 ("It would not, for example, be enough for a State to give orders or directions to a few civilian or military authorities, leaving it to them to arrange as they pleased for their detailed execution. It is for the State to supervise the execution of the orders it gives"). Kamenov notes the customary law character of this principle. *See* Tihomir Kamenov, *The Origin of State and Entity Responsibility for Violations of International Humanitarian Law in Armed Conflicts*, in IMPLEMENTATION OF INTERNATIONAL HUMANITARIAN LAW 169, 174 (Frits Kalshoven & Yves Sandoz eds., 1989).

In *Military and Paramilitary Activities in and Against Nicaragua*, the International Court of Justice discussed the issue of international responsibility under IHL as a function of command and control. The Court stated that it had to "determine . . . whether or not the relationship of the *contras* to the United States was so much one of dependence on the one side and control on the other that it would be right to equate the *contras*, for legal purposes, with an organ of the United States Government, or as acting on behalf of that Government." *Military and Paramilitary Activities in and Against Nicaragua* (Nicar. v. U.S.), 1986 I.C.J. 14, ¶ 109 (June 27), *reprinted* in 25 I.L.M. 1023 (1986). The same issue is raised where state contingents fall under U.N. command. According to Nicaragua's assertions concerning the relationship between the *Contras* and the United States, "any offenses which [*the contras*] have committed would be imputable to the Government of the United States, like those of any other forces placed under the latter's command." *Id.* ¶ 114 (emphasis added). Ultimately, the Court did not find present

command and control over all troops comprising its forces, which are recruited and organized as national contingents.¹⁶¹ As a consequence of its command and control, the United Nations is deemed a party to armed conflict and thereby subject to the obligations of IHL. In contrast, as a consequence of their lack of control, troop contributing states are neither parties to the armed conflict nor directly responsible for the actions of U.N. armed forces.¹⁶² Were it otherwise, it would certainly be quite a surprise to those states who consent to the introduction of U.N. forces into their territory, only to learn that they have actually consented to the introduction of an assortment of national forces from the various contributing states. Again, the U.N. position makes no sense in the context of the existing paradigm of humanitarian law.

Although troop contributing states are not parties to the armed conflict, this does not provide a superior orders defense for the actions of state

those characteristics of command necessary to attribute to the United States the acts of the contras. The Court determined that the United States had not "devised the strategy and directed the tactics" of the Contra operations, *id.* ¶ 110, had not "directed or enforced the perpetration of . . . acts contrary to humanitarian law," *id.* ¶ 115, and had not exerted "effective control of the military or paramilitary operations in the course of which the alleged violations were committed," *id.*, any one of which would be necessary for attribution of Contra acts to the United States. In contrast, the U.N. command and control structure does exercise each one of these controlling functions with respect to state troop contingents and would thereby incur liability for the Organization in the event that IHL violations were to occur in the course of an operation.

161. See *supra* note 2.

162. See Hague Convention (IV), *supra* note 4, arts. 1, 3, Annex, arts. 1, 3, 2 AM. J. INT'L L. at 92-93, 97-98, DOCUMENTS ON THE LAWS OF WAR at 46, 48; Geneva Conventions of 1949, *supra* note 4, 6 U.S.T. at 3148, 3250, 3420, 3618, 75 U.N.T.S. at 64, 116, 238, 388 (arts. 51, 52, 131, and 148, respectively); *supra* notes 69-84 and accompanying text. This conclusion is in accord with U.N. practice. For example, in response to Morocco's threats to withdraw from ONUC yet remain in the Congo until the U.N. changed its approach to the various other conflictive parties there, the Secretary-General made clear that as incorporated into ONUC, troop contingents were no longer considered organs of their contributing states, but that the presence of such troops, outside of ONUC, would have consequences for Morocco, the contributing state. He stated:

Were a national contingent to leave the United Nations Force, they would have to be regarded as foreign troops introduced into the Congo, and the Security Council would have to consider their continued presence in the Congo, as well as its consequences for the United Nations operation, in this light.

U.N. SCOR, 15th Sess., 896th mtg. ¶ 109, U.N. Doc. S/PV.896 (1960). Similarly, the United Nations alone entered into an agreement settling claims by Belgian nationals against the United Nations for damage to persons and property arising out of U.N. operations in the Congo, thereby implying that such damage was not caused by an individual troop contributing state. See Agreement Relating to the Settlement of Claims Filed Against the United Nations in the Congo by Belgium Nationals, *supra* note 5 (specifically excluding claims arising from military necessity). Similarly, it was the United Nations that paid a *somme forfaitaire* to the ICRC on behalf of ICRC personnel killed in the Congo where the evidence implied that they were killed by U.N. forces. The United Nations made the payment without admitting any legal or financial liability. See SEYERSTED, *supra* note 2, at 195. In contrast, the United Nations paid no claims in connection with the Korean conflict.

contingents,¹⁶³ because troop contributing states are responsible to the United Nations by virtue of their contribution agreements with the United Nations and the U.N. regulations governing the force.¹⁶⁴ Individual responsibility exists for any member of a U.N. armed force who commits an act constituting a war crime.¹⁶⁵ In addition, the troop contributing states, as non-parties to the conflict, remain obligated "to ensure respect" for IHL.¹⁶⁶ The obligation to observe U.N. command and control never requires a state contingent to execute U.N. orders¹⁶⁷ that violate IHL.

Analysis of U.N. responsibility with reference to the International Law Commission's draft-code of state responsibility supports the view that the United Nations alone is directly responsible for violations of IHL by the troop contingents comprising its armed forces.¹⁶⁸ The draft articles and commentary link the concepts of control and responsibility in several code sections dealing with various permutations of interstate relationships,¹⁶⁹ and expressly address the issue of armed contingents.¹⁷⁰

163. See generally D.H.N. Johnson, *The Defense of Superior Orders*, 9 AUSTL. Y.B. INT'L L. 291 (1985).

164. See *infra* notes 188-99 and accompanying text.

165. See *supra* note 92.

166. The ICJ concluded that the obligation "to ensure respect" for humanitarian law "does not derive only from the [Geneva] Conventions themselves, but from the general principles of humanitarian law to which the [Geneva] Conventions merely give specific expression." Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), 1986 I.C.J. 14, ¶ 220 (June 27), reprinted in 25 I.L.M. 1023 (1986); Theodor Meron concludes that the *erga omnes* nature of conventional humanitarian norms implies a similar duty as a matter of customary law. See Meron, *supra* note 6, at 355 & n.24; cf. *Respect for Human Rights in Armed Conflict (I)*, *supra* note 5, ¶ 82, at 31 (citing Gerald G. Fitzmaurice, *Second Report on the Law of Treaties*, U.N. GAOR, 12th Sess., Agenda Item 2, ¶¶ 125-26, U.N. Doc. A/CN.4/107 (1957), reprinted in [1957] 2 Y.B. Int'l L. Comm'n 16, 54, U.N. Doc. A/CN.4/SER.A/1957/Add.1, U.N. Sales No. 59.V.5.vol.II); RESTATEMENT (THIRD), *supra* note 4, §§ 702 cmt. o, 703(1-2) & n.3 (regarding human rights). Kamenov speaks of semi-direct responsibility originating for the United Nations "on the ground of obligation 'to ensure respect,'" under Article 1 of the Geneva Conventions. See Kamenov, *supra* note 160, at 189.

167. See *supra* note 163.

168. See *Report of the International Law Commission on the Work of Its Thirty-First Session*, U.N. GAOR, 34th Sess., Supp. No. 10, at 239, U.N. Doc. A/34/10 (1979), reprinted in [1979] 2 Y.B. Int'l L. Comm'n pt. 2, at 1, 91, U.N. Doc. A/CN.4/SER.A/1979/Add.1 (Part 2), U.N. Sales No. E.80.V.5 (Part II); see also Kamenov, *supra* note 160, at 187-93.

169. The draft code, by its terms, deals with "state" responsibility; however, the United Nations is not immune from IHL obligations simply because it is not a state. See *supra* notes 11-48 and accompanying text. The draft code corroborates the link between command and control and responsibility in the context of state obligations. Draft Article 9 mentions the provision of an organ of an international organization to a state and not the reverse, but the principle remains the same.

170. See *Report of the Commission to the General Assembly on the Work of Its Twenty-Sixth Session*, U.N. GAOR, 29th Sess., Supp. No. 10, U.N. Doc. A/9610/Rev.1 (1974), reprinted in [1974] 2 Y.B. Int'l L. Comm'n pt. 1, at 157, 288, U.N. Doc. A/CN.4/SER.A/1974/Add.1 (Part One), U.N. Sales No. E.75.V.7 (Part I) (discussing situations in which a third state sends troops to aid a government facing rebellion where the third state retains command and control over its troops).

Draft article 9 deals expressly with the situation in which a state or international organization places an organ at the disposal of another state,¹⁷¹ a situation analogous to the furnishing of troop contingents to the United Nations. Article 9 attributes the conduct of the borrowed governmental organ to the borrowing state as a function of the control exercised over that borrowed governmental organ by the borrowing state. The borrowing state is deemed responsible so long as "[the borrowed] organ was acting in the exercise of elements of the governmental authority of the State [read 'United Nations'] at whose disposal it has been placed."¹⁷² Whether troop contingents are acting in the capacity of U.N. organs is a question of fact.¹⁷³ The commentary to draft article 9 expressly states that article 9 does encompass situations in which a state,

genuinely places at the disposal of another State [United Nations] a contingent of its own armed forces, so that the other State [United Nations] may employ that contingent under its authority and control and assign it to tasks which may involve the exercise of elements of the beneficiary State's [United Nations'] governmental authority.¹⁷⁴

The commentary distinguishes the case in which one state sends military contingents to assist the military of another state, where the military contingents rendering assistance are not "placed at the disposal" of the other state, and instead, remain under the control of the sending state and continue to "act under its [the sending state's] orders, control and instructions."¹⁷⁵ Thus, draft article 9 supports the view that the acts of state military contingents furnished to the United Nations are attributable to the

171. The text of draft Article 9 is as follows:

Article 9. Attribution to the State of the conduct of organs placed at its disposal by another State or by an international organization.

The conduct of an organ which has been placed at the disposal of a State by another State or by an international organization shall be considered as an act of the former State under international law, if that organ was acting in the exercise of elements of the governmental authority of the State at whose disposal it has been placed.

Report of the International Law Commission on the Work of Its Thirty-First Session, *supra* note 168, at 239, *reprinted in* [1979] 2 Y.B. Int'l L. Comm'n at 91.

172. *Id.*

173. See *Summary Records of the 1211th Meeting*, [1973] 1 Y.B. Int'l L. Comm'n 46, 47, U.N. Doc. A/CN.4/Ser.A/1973, U.N. Sales No. E.74.V.4; *cf.* United States Diplomatic and Consular Staff in Tehran (U.S. v. Iran), 1980 I.C.J. 3, 35 (24 May).

174. See *Report of the Commission to the General Assembly on the Work of Its Twenty-Sixth Session*, *supra* note 170, ¶ 12, at 125, *reprinted in* [1974] 2 Y.B. Int'l L. Comm'n at 288 (discussing situation in which a third state sends troops to aid a government facing rebellion where the third state retains command and control over its troops).

175. *Id.* ¶ 11.

United Nations where those military contingents are acting under the command and control of the United Nations.

Draft article 5 also supports U.N. responsibility for the acts of state troop contingents. Under draft article 5, the acts of state organs are attributed to the state so long as the organ in question "ha[s] that status under the internal law of that State" and "provided that organ was acting in that capacity in the case in question."¹⁷⁶ U.N. forces are analogous to state forces within the meaning of this provision when U.N. forces, including their component state contingents, are constituted as subsidiary organs of the United Nations under the Charter and under the Organization's internal regulations¹⁷⁷ — the "internal law" of the United Nations.

Viewed from the perspective of the troop contributing state, draft articles 9 and 5 address the circumstances in which the acts of a state contingent may not be attributed to the contributing state, supporting U.N. responsibility by negative implication. When a troop contingent is acting in the capacity of a U.N. organ for the purposes of draft articles 9 and 5, it can not also be acting in the capacity of an organ of the contributing state.¹⁷⁸

In accordance with draft article 10, the United Nations should be responsible for the rogue acts of state contingents on loan to the United Nations and otherwise under U.N. command and control, so long as the rogue acts were not carried out pursuant to the commands of the troop contributing state.¹⁷⁹ This comports with the customary law rules by which

176. Draft Article 5 states:

For the purposes of the present articles, conduct of any State organ [the troop contingents] having that status under the internal law of that State [the United Nations] shall be considered as an act of the State concerned [United Nations] under international law, provided that organ was acting in that capacity in the case in question.

Report of the International Law Commission on the Work of Its Thirty-First Session, *supra* note 168, at 239, reprinted in [1979] 2 Y.B. Int'l L. Comm'n at 91.

177. For example, the General Assembly created UNEF I as a subsidiary organ of the General Assembly as authorized under Charter Article 22. See G.A. Res. 1000, U.N. GAOR, Emergency Special Sess., pt. 1, Supp. No. 1, at 2, U.N. Doc. A/3354 (1956); *see also Regulations Governing United Nations Force in the Congo*, *supra* note 2; Certain Expenses of the United Nations, 1962 I.C.J. 151, 170–71, 175–77 (20 July). The United Nations force in the Congo (ONUC) was constituted as an organ of the Security Council as authorized by Charter Article 29. See S.C. Res. S/4387, *supra* note 2, at 16; *Regulations Governing United Nations Force in the Congo (ONUC)*, *supra* note 2, arts. 5–6; Certain Expenses of the United Nations, 1962 I.C.J. at 151; *see also, Model Agreement*, *supra* note 2, ¶ 4.

178. See Kamenov, *supra* note 160, at 188 (rejecting the possibility that the United Nations and a troop-contributing state could share direct responsibility under IHL).

179. Article 10 states:

The conduct of an organ [the contributed troop contingent] of a State, of a territorial governmental entity or of an entity empowered to exercise elements of the govern-

a state bears international responsibility for the rogue acts of contingents otherwise under its own command and control.¹⁸⁰ The argument under article 10 takes as a starting point the functioning of contingents as subsidiary organs of the United Nations, acting under its command and control. In that context, the United Nations is held responsible when one of its troop contingents commits an internationally wrongful act contrary to U.N. regulations or instructions.¹⁸¹

Of course, U.N. responsibility presupposes that the troop contingent's rogue acts were not performed pursuant to the supervening commands of the troop contributing state. Where the troop contributing state reasserts *de facto* operational command and control over its troop contingent, it renders itself a party to the armed conflict, becoming directly responsible for the acts of its contingent, whether or not it acts in violation of U.N. regulations governing the force or in violation of an international agreement with the United Nations.¹⁸² This, too, is true as a matter of customary IHL,¹⁸³ and brings the acts of the state and its contingent within the provisions of draft articles 9 and 5.¹⁸⁴

There are many possible consensual arrangements for the *sharing* of control over armed forces, discussion of which exceeds the scope of this article. But as a category, violations of IHL that occur in the context of operations in which the United Nations and a troop contributing state

mental authority [United Nations], such organ [troop contingent] having acted in that capacity, shall be considered as an act of the State [United Nations] under international law even if, in the particular case, the organ [troop contingent] exceeded its competence according to internal law [U.N. regulations governing the force] or contravened instructions [of U.N. commanders] concerning its activity.

Report of the International Law Commission on the Work of Its Thirty-First Session, supra note 168, at 239, reprinted in [1979] 2 Y.B. Int'l L. Comm'n at 91.

180. See MERON, *supra* note 4, at 155-61.

181. See *Commentary to Article 10, Report of the International Law Commission to the General Assembly*, U.N. GAOR, 30th Sess., Supp. No. 10, at 16, U.N. Doc. A/100/10/Rev.1 (1975) (Youmans and Caire cases); RESTATEMENT (THIRD), *supra* note 4, § 207, cmt. d & n.4 (attribution to a state of the actions of an official or official body acting under color of authority).

182. With regard to troop contribution agreements, Kamenov speaks of the lifting of the U.N.'s "organizational veil" as a consequence of "de facto disregard in a definite manner of the constitutional agreements for provision of the troops." See Kamenov, *supra* note 160, at 189. A state would be deemed to exert *de facto* control over its contingent to the extent that the national commander violates the U.N. chain of command by refusing to execute U.N. instructions without the prior approval of the contributing state government. Such a situation led to the July 14, 1993 recall of an Italian contingent commander in Somalia. See Julia Preston, *U.N. Removes Italian General Impeding Somalia Operation*, WASH. POST, July 15, 1993, at A20. However, it should be noted that a state contingent's refusal to undertake an operation will rarely result in IHL violations unless the refusal contravenes an affirmative IHL obligation to act.

183. See *supra* notes 160-61 and accompanying text.

184. See *supra* notes 171-77 and accompanying text.

together "devise the strategy and direct the tactics"¹⁸⁵ or share effective control,¹⁸⁶ engage the international responsibility of both the United Nations and the troop contributing state jointly.¹⁸⁷

Command and control over U.N. armed forces is legally established through the regulations governing the force¹⁸⁸ and through the troop contribution agreements between the U.N. and contributing states.¹⁸⁹ Where a state has retained *de facto* command over a contingent resulting in violations of IHL or where a state's contingent has committed violations of IHL in the course of rogue acts, breaches of the contribution agreement and regulations have occurred, and the United Nations is entitled to demand redress for their violation.¹⁹⁰ Redress should include that amount of compensation from the contributing state necessary to indemnify the United Nations for reparations that it has to make as a result of its direct responsibility.¹⁹¹ The United Nations is also under a duty to "ensure respect" for IHL as a matter of customary law,¹⁹² which may require the United Nations to demand redress so as to deter breakdown in command and control and to reduce the incidence of IHL violations.¹⁹³ Consultations

185. Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), 1986 I.C.J. 14, ¶ 110 (June 27), reprinted in 25 I.L.M. 1023 (1986).

186. *Id.* ¶ 115.

187. See generally Richard R. Baxter, *Constitutional Forms and Some Legal Problems of International Military Command*, 29 BRIT. Y.B. INT'L L. 325 (1952) (regarding joint coalition arrangements). In Bosnia, the air strikes carried out by NATO forces implicate the responsibility of the individual participating states because operational control rests with those states even though target selection and determinations regarding the conditions under which the air strikes are carried out are made by U.N. commanders. See *id.* at 337; Roger Cohen, *NATO Requests a Broader Right to Attack Targets in Bosnia*, N.Y. TIMES, Oct. 11, 1994, at A8.

188. As UNEF I was constituted as an organ of the General Assembly, see *supra* note 177, the regulations binding UNEF, were issued by the Secretary-General pursuant to the authorization of the General Assembly. See G.A. Res. 1001, U.N. GAOR, 1st Emergency Special Sess., Supp. No. 1, at 3, U.N. Doc. A/3354 (1956). With ONUC, the regulations binding the force, see *Regulations Governing United Nations Force in the Congo (ONUC)*, *supra* note 2, were issued pursuant to the authorization of the Security Council. See *Certain Expenses of the United Nations*, 1962 I.C.J. 151, 175-77 (20 July).

189. See *supra* note 2. The capacity of the United Nations to enter into international agreements was affirmed by the International Court of Justice. See *Reparation for Injuries Suffered in the Service of the United Nations*, 1949 I.C.J. 174, 179 (Apr. 11).

190. See *Reparation for Injuries Suffered in the Service of the United Nations*, 1949 I.C.J. at 174. As a general matter, international law requires that the violation of international law be terminated and that reparations be made. See RESTATEMENT (THIRD), *supra* note 4, § 901.

191. See RESTATEMENT (THIRD), *supra* note 4, § 901; *Conditions of Application of Humanitarian Rules of Armed Conflict to Hostilities in which United Nations Forces May Be Engaged*, *supra* note 3, art. 8, at 469 ("The United Nations is liable for damage which may be caused by its Forces in violation of the humanitarian rules of armed conflict").

192. See *supra* note 166.

193. Cf. *Conditions of Application of Humanitarian Rules of Armed Conflict to Hostilities in which United Nations Forces May Be Engaged*, *supra* note 3, art. 3(b), at 467 (Where a U.N. force is composed of national contingents, "effective compliance with the humanitarian rules of armed conflict must be secured through [the troop contribution agreements.]").

between the United Nations and the troop contributing state regarding instances of breakdown in the command structure and efforts to prevent their reoccurrence may be sufficient to qualify as redress.¹⁹⁴ However, if there exists an ongoing unwillingness on the part of the troop contributing state to cease or prevent instances in which the state contingent does not faithfully obey and execute U.N. commands such that future violations are "likely or foreseeable," the United Nations may be required to demand the withdrawal of the state contingent from the U.N. force.¹⁹⁵

All troop contributing states are also bound by the obligation "to ensure respect" for humanitarian obligations, as a matter of both conventional¹⁹⁶ and customary law,¹⁹⁷ even though they are neither party to the armed conflict nor directly responsible for IHL violations. As a consequence, each troop contributing state must seek the termination of violations by U.N. forces and reparations for the injured parties.¹⁹⁸ Moreover, troop contributing states as well as non-troop contributing states may be obligated to make some effort to bring about the prosecution of individuals for war crimes, as a function of their horizontal IHL obligations.¹⁹⁹ To the extent that there exists an ongoing unwillingness on the part of the Secretary-General or the Security Council to cease or prevent IHL violations or to provide redress for IHL breaches, a contributing state may be obligated further to withdraw its contingent from the U.N. force.

Ultimately, attribution of direct international responsibility for IHL violations to the troop contributing states would destroy the military effectiveness of any U.N. force. If IHL violations carried out by state contingents under U.N. orders could render the troop contributing states

194. See RESTATEMENT (THIRD), *supra* note 4, § 901, cmt. d ("Acknowledgment of a violation and an apology are common forms of redress[.]"). It may be that any international act taken with the intent to redress symbolically the wrong done will sufficiently fulfill the international obligation of redress.

195. In the Nicaragua Case, the ICJ determined that an obligation on the part of the United States to ensure respect for IHL was breached by the distribution to the Contras of a field manual that encouraged violations of IHL under circumstances in which the occurrence of such violations was "likely or foreseeable." *Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.)*, 1986 I.C.J. 14, ¶¶ 254-56 (June 27), reprinted in 25 I.L.M. 1023 (1986).

196. See Geneva Conventions of 1949, *supra* note 4, 6 U.S.T. at 3114, 3217, 3316, 3516, 75 U.N.T.S. at 31, 85, 135, 287 (common art. 1). 185 states are bound by the Geneva Conventions of 1949, as a matter of conventional law. See *supra* note 16.

197. See *supra* note 166.

198. See RESTATEMENT (THIRD), *supra* note 4, § 901. To the extent that U.N. orders resulting in breaches of IHL violate the troop contribution agreement, the troop contributing state has another ground upon which it must assert an IHL obligation as a consequence of the duty to ensure respect for IHL.

199. See *supra* note 166 (discussing affirmative duty to ensure respect for humanitarian obligations); RESTATEMENT (THIRD), *supra* note 4, § 404 (Universal Jurisdiction to Define and Punish Certain Offenses).

liable for those violations as a party to the armed conflict, all U.N. command decisions would be undermined by the second guessing of the foreign policy makers of troop contributing states. The result would be a total breakdown in the command structure that, in combat situations, would not only diminish the ability of the U.N. force to accomplish its larger mission, but would also endanger the troops in the field.

Respect for the legal obligations existing between the United Nations and the troop contributing states, and redress for violations of the same, may be politically difficult if not impossible to achieve given the structure of U.N. forces formed from state contingents. However, solutions to this problem must involve changes in the way the United Nations is structured and does business. Solutions may not be based on the subordination of individual human dignity to U.N. politics in violation of the norms of humanitarian law. For example, the steps necessary to observe legal humanitarian obligations may *require* that states train special units to function under U.N. control, whether or not pursuant to the mechanism of Article 43 agreements. Perhaps the obligation to comply with IHL will necessitate the direct recruitment of U.N. forces, or their recruitment in some manner that does not leave force contingents susceptible to direct influence by states, and effectively channels state involvement with the U.N. force through the political organs of the Organization. Notwithstanding the examples just mentioned, the status quo or alternatives based on the notion that the ends of a U.N. military mission justify attendant IHL violations, are simply not permitted.

CONCLUSION

Despite serious alleged violations of IHL by U.N. armed forces, there exists a curious lack of concern on the part of the international community. Of course, the very process by which U.N. military forces are authorized to engage in armed conflict guarantees that, at the very least, even the most powerful of nations have an interest in the U.N.'s application of force. Where U.N. armed forces intervene in what would otherwise constitute civil war, the intervention is *per se* predicated on the belief that international peace and security will be enhanced, thus benefitting all existing states. On the other hand, those who suffer humanitarian violations from such an operation will by definition be localized in one, two, or three states, states that are not likely to be major powers. This imbalance between benefit and burden in the calculus of international politics has, not surprisingly, led to a resounding silence from the international community as a whole regarding the systemic problem of IHL violations by U.N. forces.

Nevertheless, the United Nations is bound by the rules of customary IHL, and occupies a horizontal relationship with the other subjects of IHL with which it is engaged in armed conflict. The fact that the Organization is so bound does not compromise the vertical relationship that exists between the Organization and the subjects of international law which it regulates pursuant to its Charter based powers to make recommendations, to take binding decisions, or to authorize the use of force as a matter of the *jus ad bellum*. Moreover, the application of IHL to U.N. forces will not compromise the U.N. mission to promote peace.

When U.N. forces engage in military conflict, the Organization qualifies as a "party to armed conflict" within the meaning of IHL, and its troops fall within the IHL definition of "combatants." Arguments to the contrary either deprive IHL concepts of their determinacy or regress to a claim of special status for the Organization to which it is not entitled. For the same reasons, U.N. obligations can not be limited to the "principles and spirit" of IHL; the United Nations is bound by the same customary IHL obligations binding upon states.

When U.N. armed forces intervene in civil war situations, they are bound by the full international IHL regime. The existing allocation of law making authority between sovereign states on one hand and the international order on the other leaves individual states and the United Nations without the authority to assert the civil war regime. This allocation of substantive law making authority can be changed by an international law making process capable of reallocating law making jurisdiction in the international system as a whole. Such a reallocation can not be accomplished by way of international treaties effective only between the parties thereto. In the alternative, the substantive IHL rules pertaining to civil wars can be changed. The recently adopted Convention on the Safety of United Nations and Associated Personnel did not attempt to reallocate jurisdiction and has yet to change customary IHL.

U.N. obligations under IHL can not be satisfied by troop contributing states. By virtue of U.N. command and control, the United Nations alone is responsible under IHL for the conduct of its forces. Under the existing IHL paradigm, only an authority that exerts command and control can require that forces comply with IHL obligations, a view that is supported by the International Law Commission's draft code on state responsibility. The notion that troop contributing states could be directly responsible for actions taken under U.N. command and control would wreck havoc with the command structure and cripple the effectiveness of any U.N. force, because the possibility of IHL responsibility would create an incentive for contributing states to interfere and second guess virtually all operational instructions.

It is imperative that the United Nations accept its IHL obligations fully. Existing problems with Organization funding, the recruitment of contingents from states, and political discomfort arising out of the assessment of responsibility for IHL violations can not, as a matter of law, justify the status quo. To the extent that this requires the United Nations to cease organizing peacekeeping or peace enforcement forces around troop contingents contributed by states, that must be done, even if it brings a halt to peacekeeping in the short term. The principle of humanity may not be subordinated to political or utilitarian goals. The difficulties inherent in change must be accepted and will lead ultimately to long term growth and regeneration of the U.N. peacekeeping role as peacekeeping operations come to reorganize their efforts to better address humanitarian concerns.